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Title: Federal Trade Commission, Petitioner
v.
Superior Court Trial Lawyers Association

Docketed:
January 23, 1989

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
88-1393

Counsel for petitioner: Arquit,Kevin J., Isenstadt,Ernest J.

Counsel for respondent: Rosenthal,Douglas, Baker,Donald I., Tom,Willard K.

Entry	Date	Note	Proceedings and Orders
1	Jan 23 1989	G	Petition for writ of certiorari filed.
2	Jan 23 1989		Appendix of petitioner FTC filed.
3	Feb 22 1989		DISTRIBUTED. March 17, 1989
4	Feb 22 1989	X	Brief of respondents Superior Court Trial Lawyers Assn., et al. in opposition filed.
5	Mar 23 1989		Reply brief of petitioner FTC filed.
6	Mar 29 1989		REDISTRIBUTED. April 14, 1989
7	Apr 17 1989		Petition GRANTED. The case is consoliated with 88-1393, and a total of one hour is allotted for oral argument. **********
8	May 16 1989		Lodging received. Volumes 1, 2, and 3. (3 boxes).
9	May 16 1989	G	Motion of of the parties to dispense with printing the joint appendix filed.
11	May 22 1989		Order extending time to file brief of petitioner on the merits until June 22, 1989.
12	Jun 5 1989		Motion of of the parties to dispense with printing the joint appendix GRANTED.
13	Jun 22 1989		Brief of petitioner FTC filed. VIDED.
14	Jun 22 1989		Brief amici curiae of Arizona, et al. filed. VIDED.
15	Jul 6 1989	D	Motion of respondents/cross-petitioners Superior Court Trial Lawyers Association, et al. for divided argument filed.
17	Jul 14 1989		Order extending time to file brief of respondent on the merits until August 1, 1989.
18	Jul 26 1989		Brief amicus curiae of American Medical Association filed. VIDED.
20	Jul 28 1989		Brief amicus curiae of National Assn. of Criminal Defense Lawyers filed. VIDED.
21	Aug 1 1989		Brief amici curiae of ACLU, et al. filed. VIDED.
22	Aug 1 1989		Brief amici curiae of Washington Council of Lawyers, et al. filed. VIDED.
23	Aug 1 1989		Brief of respondents Ralph J. Perrotta, et al. filed. VIDED.
24	Aug 1 1989		Brief of respondent Sup. Ct. Trial Lawyers filed. VIDED.
27	Aug 28 1989		SET FOR ARGUMENT MONDAY, OCTOBER 30, 1989. (2ND CASE)
25	Aug 30 1989		Motion of respondents/cross-petitioners Superior Court Trial Lawyers Association, et al. for divided argument DENIED.
26	Aug 31 1989		Reply brief of petitioner FTC filed. VIDED.
28	Sep 13 1989		CIRCULATED.
29	Oct 30 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-1198

No. 88-

Supreme Court, U.S.
FILED
JAN 23 1989
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION
RALPH J. PERROTTA
KAREN E. KOSKOFF
REGINALD G. ADDISON
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sherman Act's *per se* prohibition against naked horizontal price-fixing agreements is unconstitutional (in violation of the First Amendment) as applied to price-fixing boycotts that are part of a larger public campaign by economic competitors to obtain for themselves an economic benefit from the government.

2. Whether this Court's repeated holding that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output" is inapplicable to a naked price fixing boycott that leads to demonstrated anticompetitive effects but that is part of a larger public campaign by economic competitors to obtain for themselves an economic benefit from the government.

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No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Trade Commission, pursuant to Section 16(a)(3) of the Federal Trade Commission Act, 15 U.S.C. 56(a)(3), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals and the concurring opinion of Judge Silberman (App. 1a-61a) are reported at 856 F.2d 226. The opinion and final order of the Federal Trade Commission (App. 64a-138a) and the ini-

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[1] Section 16(a)(3) of the Federal Trade Commission Act provides, *inter alia*, that where (as is the case here) the Commission has been represented in the court of appeals by its own attorneys, it may be represented in like manner before this Court if the Solicitor General, following timely request, declines to file a petition for certiorari. The Commission has exercised this authority on only one prior occasion (*FTC* v. *Indiana Federation of Dentists*, 476 U.S. 477 (1986)), and does so here because it believes the decision below will have exceptionally serious adverse consequences for enforcement of the antitrust laws.

tial decision of the administrative law judge (App. 139-229a) are officially reported at 107 F.T.C. 510.

JURISDICTION

The judgment of the court of appeals (App. 62a) was entered on August 26, 1988. A timely petition for rehearing was denied on October 25, 1988 (App. 63a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution, Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), are set forth at App. 230a.

STATEMENT

1. This case involves the concerted refusal by competing private-practice attorneys to provide their services to the District of Columbia at the price being offered by the District, in order to induce the District to offer a higher price. The attorneys were members of the Superior Court Trial Lawyers Association (SCTLA), an organization of attorneys registered to accept case assignments under the Criminal Justice Act, D.C. Code Ann. 11-2601 *et seq.* (1981 and 1988 Supp.) ("the CJA").[2] That Act provides for appointment of private counsel to represent indigent individuals charged with crimes in the District of Columbia Superior Court.

[2] The individual attorneys named in the caption of this case were members of SCTLA and leaders of the challenged boycott. They were respondents in administrative proceedings before the Commission and petitioners before the court of appeals.

CJA attorneys represent approximately 85% of all defendants in the District of Columbia Superior Court unable to afford counsel.[3] Any member in good standing of the D.C. Bar with a local address and phone number may register with the CJA office of the Public Defender Service ("PDS") to receive CJA appointments, and some 1200 attorneys have so registered. In practice, however, most appointments go to a much smaller group of about 100 CJA "regulars" who earn most or all of their income from CJA cases. (App. 3a-4a.)

From 1970 until 1983, CJA case fees were $30 per hour for court time and $20 per hour for other time, subject to a per-case maximum of $1000 for felonies, $400 for misdemeanors, and $1000 for appeals (App. 4a). In 1982-83, various CJA attorneys acting through SCTLA began a lobbying effort to increase CJA compensation levels, arguing that the public would benefit from increased expenditures for legal help to the indigent. Although various city officials and others expressed agreement with the lobbyists' goals, the D.C. City Council had not, as of August 1983, enacted legislation to increase the CJA compensation rate. (*Id.* at 5a-6a.)

Dissatisfied with the lack of lobbying results, a group of about 100 CJA lawyers met on August 11, 1983, and agreed among themselves to refuse new CJA case assignments unless the D.C. Government increased CJA rates by September 6, 1983. The agreement was memorialized by a petition that was posted in the lawyers' lounge of the D.C. Superior Court and signed by numerous CJA attorneys. (App. 7a-8a.) It read (*id.* at 78a):

[3] Another 8-10% (generally in more serious cases) are represented by the Public Defender Service, and the rest by third-year law students and *pro bono* private attorneys (App. 3a).

> We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.

The District of Columbia government did not increase CJA reimbursement rates as the lawyers demanded. Accordingly, on September 6, 1988, they implemented the price-fixing boycott to which they had agreed. The boycott, which included among its adherents nearly all CJA "regulars," had a "severe impact on the criminal justice system" (App. 9a). PDS attorneys and those few other bar members who volunteered to accept new case assignments could not keep pace with the flow of accused defendants. Facing an imminent "crisis" in the criminal justice system, the PDS Director wrote Mayor Barry on September 15, 1983, urging that he support legislation increasing CJA rates.[4] The Mayor recommended such legislation, which was enacted shortly thereafter, and the boycotting attorneys resumed accepting CJA assignments. (*Id.* at 10a-11a.)

2. In December, 1983, the Commission issued a complaint against SCTLA and its officers, alleging that the concerted refusal to accept new case assignments unless the District increased its price was an unfair method of competition in violation of Section 5 of the

[4] Superior Court Chief Judge Moultrie also advised the mayor that the criminal justice system was approaching a crisis point. Although supportive of raising the hourly fees for CJA representation, Judge Moultrie was "unalterably opposed to a strike or an organized boycott as a method to bring about the needed changes." (App. 81a & n.47, 200a & n.192)

FTC Act.[5] Following hearings, the administrative law judge to whom the case was assigned dismissed the complaint on the theory that "there was no harm done." In his view, "city officials (and practically everyone else concerned with the criminal justice system)" believed a rate increase was desirable and a boycott was the only means to induce the balky elected legislature to do what the cognoscenti knew was right. (App. 12a.)

The Commission reversed the initial decision, rejecting the finding that the "city supported the boycott" and holding that "[e]ven if proved, the acquiescence or support of some members of the city government would not immunize the [lawyers'] boycott to increase prices from the antitrust laws" (App. 97a). The Commission concluded that the lawyers' "concerted refusal to deal for the purpose of raising the fees paid to them under the CJA program is unlawful" both *per se* and under a rule of reason analysis (*id.* at 87a). The Commission entered an order designed to prohibit SCTLA and the named individual respondents "from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process" (*id.* at 136a).

3. On petition for review, the court of appeals reversed and vacated the Commission's order and remanded for further proceedings to determine whether the boycotting CJA lawyers possessed market power. The court recognized that "the SCTLA boycott was an unlawful restraint of trade" that "could properly be con-

[5] In analyzing the case, the Commission, the court of appeals, and SCTLA have applied precedents under the Sherman Act, violations of which constitute "unfair methods of competition" under the FTC Act (*FTC* v. *Cement Institute*, 333 U.S. 683, 693 (1948); App. 11a, 16a). Accordingly, all succeeding discussion refers to the Sherman Act rather than the FTC Act.

demned as a *per se* violation of Section 1 of the Sherman Act, unless it also comes within the protection of the First Amendment" (App. 32a).[6] The court also rejected SCTLA's claim that under the *Noerr-Pennington* doctrine, its conduct was entitled to complete First Amendment immunity.[7] The court further dismissed SCTLA's contention that its conduct was a "political boycott" under *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), expressly affirming the Commission's finding that the boycott "was motivated primarily by economic self-interest" (App. 43a) and noting this Court's limitation of *Claiborne Hardware* to situations in which the

[6] The court recognized that the boycott was a "naked" restraint of trade, *i.e.*, it was not ancillary to any efficiency-producing integration of functions by competitors. Although judicial treatment of so-called "ancillary" restraints has varied, the court recognized that the SCTLA boycott was "the essence of 'price-fixing' " and "a classic restraint of trade within the meaning of Section 1 of the Sherman Act" and that there has never been a change in the rule that such naked horizontal restraints are illegal *per se* (App. 16a, 21a-22a). This Petition refers to "*per se*" illegality, "summary condemnation" and "condemnation without regard to market power" interchangeably to denote the Sherman Act's prohibition upon naked horizontal restraints of trade irrespective of whether market power (or actual detrimental competitive effects) can be proven.

[7] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). The *Noerr-Pennington* doctrine excludes from Sherman Act liability joint lobbying, even though the lobbyists may seek (or achieve) anticompetitive legislation or have an anticompetitive purpose in mind. But the court recognized that *Noerr-Pennington* has never been construed to immunize price-fixing boycotts and other classic trade restraints merely because the perpetrators wish to use such conduct as a means to lobby the legislature (App. 34a-38a).

boycotters are not economic competitors promoting a parochial economic interest (*id.* at 39a-44a).

Having found the boycott not immune from the antitrust laws, the court of appeals then considered whether condemnation without proof of market power was permissible. The court concluded that "the SCTLA boycott did contain an element of expression warranting First Amendment protection" (App. 46a). Applying the four-part test for evaluating "expressive conduct" in *United States* v. *O'Brien*, 391 U.S. 367 (1968), the court held the Sherman Act satisfied the first three prongs (see n. 8, *infra*), but failed the fourth, *i.e.*, that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of [the governmental] interest [served by the statute]" (App. 47a).

The court observed that *per se* rules are a "legitimate and substantial aid in the administration of the antitrust laws" (App. 50a), but held that this "evidentiary shortcut to antitrust condemnation without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate" (*ibid.*). The court then decided that, although the boycotters comprised nearly all the attorneys who made a practice of handling CJA cases and the boycott's result had been to deprive Superior Court of sufficient attorneys to represent the flow of indigent accused, the record nonetheless did not show that the boycotters had market power (*id.* at 53a-55a).

The court held that the Commission must decide on remand whether other D.C. lawyers (who did not ordinarily accept CJA assignments) were in the same market as CJA lawyers, so as to exclude the possibility that their omission to seek CJA assignments during the boycott owed to "political sympathy" with the boy-

cotters (App. 54a-55a). The court also directed that "[i]f the Commission determines that petitioners have significant market power, it will need to determine also how much market power is sufficient to justify the condemnation of an expressive boycott" (*id.* at 56a). Judge Silberman filed a concurring opinion (*id.* at 58a-61a).

The Commission filed a timely petition for rehearing and suggestion of rehearing *en banc,* which were both denied on October 25, 1988 (App. 63a).

REASONS FOR GRANTING THE PETITION

This Court "ha[s] not wavered in [its] enforcement of the *per se* rule against price-fixing" (*Arizona* v. *Maricopa County Medical Soc'y,* 457 U.S. 332, 347 (1982)). It has "consistently and without deviation" held naked horizontal price-fixing agreements to be unlawful "contract[s] * * * in restraint of trade" (15 U.S.C. 1), whether the conspirators can be proven to have market power or not (*United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 218, 221 (1940)). As this Court has said time and again, "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output" (*FTC* v. *Indiana Federation of Dentists,* 476 U.S. 447, 460 (1986), citing *NCAA* v. *Board of Regents of Univ. of Okla.,* 468 U.S. 85, 109 (1984)). This "oldest and clearest of antitrust doctrines" (R. Bork, *The Antitrust Paradox,* 67 (1978)) provides valuable certainty to those who must obey the law and makes possible effective law enforcement (*Arizona* v. *Maricopa County Medical Soc'y,* 457 U.S. at 344).

In rewriting the Sherman Act to require proof of market power (of an uncommonly onerous sort) to condemn a potentially vast class of publicly-conducted price-fixing agreements directed at governmental units,

the court of appeals has erected formidable new barriers to effective antitrust law enforcement at the federal, state, and local levels. No principle of First Amendment jurisprudence requires or permits this substantial abridgment of public rights; decisions of this Court, ignored by the court of appeals, expressly forbid it. Review should be granted to correct the court of appeals' erroneous legal analysis and thereby eliminate the impediment to effective antitrust enforcement that the court's holding creates.

1. A party wishing to express an opinion might engage in many types of unlawful conduct that would call greater attention to that opinion than would be received if the speaker obeyed the law. Accordingly, this Court has been reluctant to extend First Amendment protection to so-called "expressive conduct" that violates the terms of a statute. In *United States* v. *O'Brien, supra,* the Court articulated a four-part test to assess whether draft-card burning by a Vietnam War protester was protected.[8] The Court applied this test to sustain a ban on draft card destruction, although noting that the ban was but an "administrative aid" (391 U.S.at 377), aimed at "preventing harm to the smooth and efficient function of the Selective Service System" (*id.* at 382).

Dismissing *O'Brien*'s telling result with the surmise that it turned on "Congress's effort to raise and maintain an army during a period of international conflict" (App. 50a), the court of appeals concluded that although

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[8] In the Court's words (391 U.S. at 377), a regulation is justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest * * * unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

SCTLA's boycott "could properly be condemned as a *per se* violation of the Sherman Act" (*id.* at 32a), a court could ignore this statutory prohibition because the underlying "policies of the antitrust laws" (*id.* at 48a) (to eradicate trade restraints that harm competition) could still be achieved if proof of market power were required. Dismissing the *per se* ban on naked price-fixing as serving "only" (*id.* at 49a) to promote administrative convenience and efficiency, the court of appeals deemed itself obliged by *O'Brien* to accommodate the lawyers' wish to use a price-fixing boycott as a method of expression.

Even if the court of appeals properly characterized the Sherman Act's blanket prohibition on naked horizontal price-fixing as "only" an administrative aid, its use of *O'Brien* to strike down the *per se* rule in this case runs squarely afoul of this Court's precedents. In *United States* v. *Albertini*, 472 U.S. 675 (1985), involving a challenge to an administrative bar order applied to exclude a former serviceman from a military base "open house," the Court held (472 U.S. at 688-89, emphasis added):

> The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. See *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984) * * *. Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. *Id.*, at 299. *Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.*

This Court's holding in *Albertini* contrasts sharply with the court of appeals' grudging concession that "we do not say that administrative convenience may never justify an incidental restriction on expressive conduct" (App. 50a). *Albertini* leaves no room to doubt that efficacy in achieving important governmental purposes is itself a substantial governmental interest that courts are required to respect in all cases, not merely those they choose.

This case cannot be distinguished from *Albertini* by the court of appeals' puzzling assertion that the Sherman Act's *per se* prohibition of naked horizontal restraints is "not a statutory command" (App. 49a). The *per se* prohibition against naked horizontal price-fixing agreements is "the oldest and clearest of antitrust doctrines" (Bork, *supra*, at 67), an important, well-established rule of substantive law that deters antitrust violations and facilitates antitrust enforcement by identifying with precision conduct that is prohibited by the Sherman Act. Although the language of the Sherman Act itself is cast broadly (*e.g.*, "[e]very contract * * * in restraint of trade"), and has required judicial elaboration, this Court has "not wavered" in construing the statutory language to forbid naked horizontal price-fixing without proof of market power. *Arizona* v. *Maricopa County Medical Soc'y.*, 457 U.S. at 347; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 218, 221; Bork, *supra*, at 66-67. The language of a statute, as construed unvaryingly by this Court, is surely a "statutory command" that both businesspersons (including lawyers) and courts of appeals are obliged to respect. Cf. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643

(1980) (reversing court of appeals for failure to apply *per se* rule to naked horizontal restraints).[9]

Nor may this case be distinguished from *Albertini* by the court of appeals' erroneous statement that "[t]he antitrust laws permit, but do not require, the condemnation of price fixing without proof of market power" (App. 49a). This Court has repeatedly held that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output" (*NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. at 109). Of course, the antitrust enforcement authorities have discretion to pursue only those price-fixing conspiracies in which they believe market power exists, just as a statutorily-mandated 55 mph speed limit permits, but does not require, a radar patrolman to arrest motorists caught driving at 56 mph. However, this does not mean that a reviewing court may, as the court did here, reverse a prosecutor's election to prosecute a naked price-fixing boycott as a "contract * * * in restraint of trade" without proving market power. The validity of the Commission's order "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" (*Albertini*, 472 U.S.

[9] For an elaboration of the compelling policy reasons supporting the Sherman Act's prohibition on naked price-fixing agreements without regard to market power see, *e.g.*, 3 P. Areeda & D. Turner, *Antitrust Law*, ¶ 836, p. 351 (1978). That the *per se* rule promotes convenience and efficiency in law enforcement also does not make it any less a "statutory command." Innumerable provisions of law are designed to promote efficiency and clarity in achieving some underlying legislative purpose (*e.g.*, the requirement to possess a draft card sustained in *United States* v. *O'Brien*), but this has never been thought to diminish the obligation of citizens to obey, or courts to apply, such provisions.

at 689.[10]

The court of appeals' novel reading of *O'Brien* would have revolutionary effects upon many areas of law. Many statutes prohibit more than those instances of conduct that cause the substantive harm the legislature seeks to prevent. As with numeric speed limits, such "overinclusiveness" helps make laws "more certain to the benefit of everyone concerned" (*Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5 (1958)), and allows effective enforcement. If courts may ignore the value of clarity and enforcement effectiveness, citing *O'Brien* to rewrite "overinclusive" laws whenever a party sincerely desires to enhance the appeal of a lobbying campaign by engaging in unlawful conduct, the effects on society would be profound.[11]

[10] In fact, the FTC focuses its resources upon trade restraints in which it believes market power is likely to exist. Its reasons for believing such power inhered in a price-fixing agreement involving nearly every D.C. lawyer who made a practice of representing indigent clients are obvious. But the fact that prosecutors employ case selection criteria does not entitle courts to read those elements into the text of the statute being enforced.

To be sure, this Court has sometimes reinterpreted the Sherman Act to alter the categories of restraints subject to *per se* condemnation. *E.g.*, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints). But these changes have always flowed from changes in economic learning about the effect of certain categories of restraints upon competition. The Court has never altered the law's summary condemnation of naked horizontal restraints and the court of appeals suggests no economic insights that might justify doing so here.

[11] To cite only the most obvious examples, the many federal and state laws categorically prohibiting public employee strikes, without regard to whether the strikers can be proven to have market power or cause demonstrable harm to the public interest, could scarcely survive the lower court's reading of *O'Brien* in this case. Nor could local police enforce numeric speed limits or laws requir-

The court of appeals saw this as a case of "first impression" (App. 56a)[12] in which it was obliged to balance the First Amendment rights of competitors with the antitrust rights of the public. But this Court has already carefully struck that balance in the *Noerr-Pennington* doctrine, which the court of appeals' opinion itself demonstrates (*id.* at 34a-38a)–and which this Court has recently reiterated (*Allied Tube & Conduit Corp.* v. *Indian Head,* No. 87-157, slip op. at 9 (June 13, 1988))–does not protect price-fixing boycotts. Because the Sherman Act's *per se* prohibition of naked price-fixing agreements "promotes a substantial governmental interest that would be achieved less effectively

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ing obedience to traffic signals against those wishing to engage in "expressive speeding" or "expressive red light running" to call greater attention to a stalled lobbying campaign, without also proving that each alleged violation was endangering public safety. In fact, the law prohibiting federal employee strikes has been sustained as Congress wrote it (*United Fed'n of Postal Clerks* v. *Blount,* 325 F. Supp. 879 (D.D.C.) (three-judge court), *aff'd mem.,* 404 U.S. 802 (1971)), and we doubt that courts faced with kindred *O'Brien* claims in contexts outside antitrust will take seriously the reading adopted by the court of appeals here. We cite these examples merely to demonstrate that the court of appeals' legal reasoning is untenable. The Commission seeks certiorari here because of the direct impact of the appellate panel's legally erroneous holding upon efficacious enforcement of the antitrust laws.

[12] This is true only in the trivial sense that no court has previously addressed SCTLA's inventive claim that summary condemnation of price fixing is unconstitutional under *O'Brien.* Courts have routinely applied the Sherman Act to "speech" used to effect a restraint of trade. See, *e.g., Nat'l Soc'y of Prof. Eng'rs* v. *United States,* 435 U.S. 679, 693-95 (1978) ("no elaborate * * * analysis" (and certainly none of market power) required to condemn "on its face" speech in the form of a code of ethics prohibiting engineers from bidding competitively to design "large-scale projects significantly affecting the public safety").

absent the regulation" (*Albertini,* 472 U.S. at 689), *United States* v. *O'Brien* does not require or permit its alteration.

2. The court of appeals' error in holding the Sherman Act's *per se* prohibition against naked horizontal price-fixing unconstitutional in the case of public price-fixing boycotts aimed at governments is compounded by its additional requirement that in such cases the government must prove market power, even where a naked price-fixing boycott has led to demonstrated anticompetitive effects. This holding, too, is erroneous, will cause enormous confusion among antitrust practitioners and businesspersons as to what conduct is henceforth lawful, and therefore warrants review.

Where proof of market power is properly required in an antitrust case, its purpose is to enable the court to determine whether a challenged restraint is actually likely to cause anticompetitive effects, *i.e.,* increased prices or decreased output. *E.g., NCAA* v. *Board of Regents of Univ. of Okla.,* 468 U.S. at 110-111 n.42. Thus, as this Court has recently reiterated, even where market power is arguably an element of the antitrust offense, " 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects' " (*FTC* v. *Indiana Federation of Dentists,* 476 U.S. at 461 (citing 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986)).

The Commission applied this Court's teaching in holding, in the alternative, that the SCTLA boycott was unlawful under a rule of reason analysis. The Commission found that the boycott, joined by nearly 100% of all CJA "regulars" (those who made a practice of representing indigent defendants under the CJA), had "dramatically reduced the supply of lawyers to the city's CJA pro-

gram" and "adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants" (App. 96a).

The court of appeals swept these uncontested findings of competitive harm aside, hypothesizing that because the CJA lawyers' price-fixing boycott was designed to "communicate," it was possible that the City Council's acquiescence in the boycott resulted from "political" rather than "economic" influences (App. 54a-55a). But even if the record lent credence to the court's speculation, its holding effectively ignores this Court's teaching that a target's acquiescence is irrelevant to the legality of a price-fixing boycott. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. at 226.[13]

Irrespective of whether and why the District of Columbia acquiesced, the boycott's principal, uncontested adverse effect was to deprive the D.C. Superior Court of an adequate supply of attorneys to represent indigent defendants. It was precisely the intention of the boycotters to bring about this result, which occurred only after and only because they collectively agreed not to serve the District at the price it offered. The court of appeals identifies no coherent reason why the achievement of this intended restriction of output should not, as in all other cases, be deemed to satisfy any required showing of market power.

[13] Moreover, the court of appeals' novel analysis would seemingly apply to any case in which an institutional decisionmaker acquiesces in a price-fixing boycott that is accompanied by a lobbying campaign. Acquiescence might always be deemed a result of the target's acknowledgment of the "political" wisdom of the boycotters' demands, rather than a product of economic coercion. Short, perhaps, of psychoanalyzing members of the City Council or other institutional decisionmaking body, there is no way to resolve definitively why acquiescence occurs.

3. The damage to effective antitrust enforcement threatened by the court of appeals' erroneous legal holdings extends far beyond this case. As this Court has observed in another pertinent post-*O'Brien* decision ignored by the court of appeals, the validity of a law attacked under *O'Brien* "need not be judged solely by reference to the demonstration at hand." Rather, one must consider the outcome if, "absent the [challenged] prohibition," other groups sought to avail themselves of the favored constitutional treatment sought by the group before the Court. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984); accord, *Albertini*, 472 U.S. at 688-89.

The necessity to assess broader consequences is especially pertinent here because in place of the "oldest and clearest of antitrust doctrines" (Bork, *supra*, at 67), the court of appeals has created a rule that will leave government and businesspersons alike deeply confused as to whether numerous price-fixing boycotts are lawful. To evaluate the court of appeals' holding, then, one must consider not only its effect on the instant case, but also the extent to which those who have previously refrained from price-fixing boycotts in the belief they were *per se* unlawful, will be emboldened to attempt them because of the new barriers to successful prosecution that the court of appeals would erect.

Although purporting to limit its holding to the "peculiar facts of this case" (App. 56a), the court has identified no facts peculiar to this case that would permit such a limitation. The opinion accords favored treatment to price-fixing boycotts in which (1) competitors first make "active efforts to appeal to the public for support of their demand" [14] (2) against a governmental target and

[14] The court of appeals also suggests the issue involved must be a matter of "public debate" (App. 50a) but nowhere defines that term

(3) style their subsequent boycott as a continuation of this effort (*id.* at 50a-51a). The court's new rule preserves *per se* illegality for covert bid-rigging (the principal focus of criminal prosecution by the Department of Justice), but opens the door wide to a multitude of actual or threatened price-fixing boycotts (often pursued by the Commission under its civil enforcement authority) that are conducted in public (or easily could be) and that begin with an entirely lawful public effort by the conspirators to persuade the government to confer the benefit they seek.[15]

For example, in many states a small fraction of all licensed physicians treats a large fraction of those indigent consumers who rely on state or federal payments for medical care. These physicians and their colleagues frequently combine to urge increases in Medicaid payments or the like, appealing to the public and invoking the welfare of their indigent patients as a reason to increase physicians' fees. When their lobbying fails, physicians sometimes go farther, collectively refusing to pro-

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or identifies any First Amendment principle that would allow courts to accord greater rights to lawyers advocating increased public spending on legal care than to any other suppliers urging more government spending for their good or service. A "public debate" test thus does not narrow the "appeal to the public" criterion.

[15] Invariably, the putative boycotters are driven by the same mixture of motives as impelled the SCTLA lawyers here – a wish to increase the price of their offering and a sincere belief that the public would benefit if the government spent more for it.

The court of appeals' own analysis of the facts of this case would seem to preclude any narrower distinction based on "factual context" (App. 50a). The court recognized that the lawyers neither alleged nor proved that their boycott was required to vindicate any constitutional right and found that the lawyers' primary motive was to increase their billing rate (*id.* at 29a-30a, 43a).

vide medical care to indigent patients unless their rates are raised. However, to date, such concerted price-fixing boycotts, although often discussed, have been infrequent – hardly surprising given that most people have considered them illegal *per se*.[16]

By rendering uncertain the legality of any particular Medicaid boycott, the court of appeals dramatically reduces the risks for physicians who engage in them. In addition to vastly complicating administrative adjudication of the ultimate legality of such restraints, the court's opinion makes it much harder (by requiring a convincing threshold showing of market power) for state or municipal targets of such boycotts to obtain injunctions against them.[17]

The unprecedentedly onerous character of the "market power" burden thrust on antitrust plaintiffs is evident when one considers that it is irrelevant under the court of appeals' holding that the boycotting doctors comprise nearly all those who habitually treat indigent patients or that those indigent patients might be faced with, or actually suffer, the loss of vital medical care. Rather, a state would have to prove that myriad other

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[16] There are always, however, the intrepid few (*e.g.*, *O'Halloran et al.*, 5 Trade Reg. Rep. (CCH) ¶ 22,543 (August 26, 1988) (FTC consent agreement; alleged concerted refusal by five Rhode Island obstetricians to accept indigent cases absent Medicaid increase)), and both they and those who have sought to invent legal defenses for them (*e.g.*, Raup, *Medicaid Boycotts by Health Care Providers: A Noerr-Pennington Defense*, 69 Iowa L. Rev. 1393 (1984)), now have in the court of appeals' opinion a roadmap for avoiding, or making forbiddingly costly, future antitrust challenge.

[17] Although the panel was apparently moved by surmise that some city officials encouraged the SCTLA boycott (App. 54a n.35), a sad irony of its holding is that if the D.C. government (or other state or local entity) wishes to resist and halt the next such boycott, the antitrust laws may no longer help it to do so.

doctors, who had not previously treated indigent patients, were nonetheless not part of the relevant market, and would have to prove that their omission to begin treating indigent patients in order to break the boycott was not due to "political sympathy" with the boycotters (App. 54a-55a). Alternatively, plaintiffs could "define a relevant 'market' that includes all services that are effective substitutes for the [doctors'] services and are likely to be available within a reasonable time" (*id.* at 55a).[18] Although disavowing any "suggest[ion] that the exhaustive and time consuming market definition exercise that is endemic to merger litigation is necessary or desirable in this context" (*id.* at 55a),[19] the court of appeals' opinion offers no alternative, and its refusal to accept the Commission's pragmatic assessment of market power in this case[20] leaves doubt that an alternative exists.

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[18] The court does not explain what a "reasonable time" might be where a boycott deprives a government (or consumers who rely on government payments) of vital services needed on a daily basis.

[19] In fact, analysis of market power in most cases covered by the court's new law is likely to be more difficult than such analysis in many merger cases, because boycotts against governments often involve local service markets with many individual actors.

[20] *E.g.*, the court of appeals disregarded the Commission's finding that "respondents had market power" (App. 92a n.79), based on ALJ findings, that "the use of emergency alternatives to the CJA lawyers * * * constituted no meaningful restraint on the power of the CJA lawyers," that "no long-term alternative to the CJA lawyers would have solved the emergency situation" and that "without such alternatives, the role of the CJA lawyers as an essential component of the existing system was manifest" (App. 206a). Also, as noted above (pp. 15-16, *supra*), the court refused to treat reduction of supply to the buyer as an adverse economic effect demonstrating market power, because of the possibility that refusal to help break the boycott by uptown lawyers hypothesized to be in the market might owe to "political sympathy" with the boycotters (*id.* at 54a-55a). The court admits that "distinguishing between political and economic motives [of the participants in a price-fixing boycott] is a daunting task, even for a reviewing court" (*id.* at 42a), but seemingly imposes on boycott victims the far more "daunting" duty to prove the motives of the legislature and other government decisionmakers (n. 13, *supra*) and of nonparticipant bystanders who decline to help break a boycott.

In sum, the opinion below erects formidable new barriers against antitrust challenges to publicly conducted price-fixing boycotts, assuring that fewer such challenges will be undertaken or succeed, even where the boycotts create the precise harm at which the antitrust laws are aimed. The taxpaying public, no less than private parties, is entitled to have its monies spent in markets in which all participants obey the laws of competition as Congress wrote them and as this Court has always read them. The court of appeals' opinion infringes that important right in a manner that nothing in the First Amendment either compels or allows.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

88-1198

No. 88-

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION
RALPH J. PERROTTA
KAREN E. KOSKOFF
REGINALD G. ADDISON
JOANNE D. SLAIGHT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 10, 1987 Decided August 26, 1988

No. 86-1465

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, et al.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT.

Petition for Review of an Order of the
Federal Trade Commission

Donald I. Baker, of the bar of the District of Columbia Court of Appeals, *pro hac vice*, by special leave of Court, with whom *Douglas E. Rosenthal*, *Willis B. Snell*, *Michael L. Denger*, *David T. Shelledy* and *W. Todd Miller* were on the brief, for petitioners.

Ernest I. Isenstadt, Assistant General Counsel, Federal Trade Commission, with whom *Karen G. Bakat*, Attor-

ney, Federal Trade Commission was on the brief, for respondent.

Gerald P. Norton, Jo Ann Abramson, Arthur B. Spitzer and *Elizabeth Symonds* were on the brief for The American Civil Liberties Union Fund of the National Capital Area, Amicus Curiae, urging reversal.

Marc Gary and *Patricia A. McCoy* were on the brief for Washington Council of Lawyers, et al., Amici Curiae, urging reversal.

Before: ROBINSON, SILBERMAN and D.H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

Concurring opinion filed by *Circuit Judge* SILBERMAN.

D. H. GINSBURG, *Circuit Judge*: We are called upon to review a determination by the Federal Trade Commission that petitioners, the Superior Court Trial Lawyers Association and four individual member attorneys, Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison and Joanne D. Slaight, (hereinafter collectively SCTLA) violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982), by organizing and participating in a concerted refusal to deal or "boycott" aimed at forcing the District of Columbia government to increase the hourly compensation paid to attorneys who represent indigent defendants in criminal cases before the District of Columbia Superior Court. The Commission concluded that the boycott constituted an "unfair method of competition" and entered an order requiring the petitioners to cease and desist from similar conduct in the future.[1]

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[1] *See In re Superior Court Trial Lawyers Association, et al.*, Opinion of the Commission, 107 F.T.C. 562 (1986), hereinafter referred to as "FTC Decision." The Initial Decision of the Administrative Law Judge will be referred to as "I.D." and the numbered findings in that decision will be referred to as "I.D.F. ——." Citations to testimony and exhibits in the record will refer to the Joint Appendix (JA) filed in this court by the parties.

For the reasons stated below, we grant the petition for review, in part, and remand to the Commission to determine whether SCTLA had the market power necessary for the boycott to violate Section 5.

I.

The District of Columbia Criminal Justice Act, D.C. Code Ann. §§ 11-2601 - 11-2609 (1981 and 1987 Supp.) (CJA or Act) provides for the reimbursement of private lawyers who are appointed to represent indigent criminal defendants.[2] Of all defendants who are unable to pay for counsel, 85% are represented by attorneys appointed under the CJA; another eight to ten percent are represented by the Public Defender Service (PDS), generally in more serious cases, and the rest are represented by third year law students (3-5%) and by *pro bono* private attorneys (under .5%). I.D.F. 19, 20.

Any member in good standing of the D.C. Bar, who has a local address and telephone number, may register with the CJA office of the PDS to receive appointments under the Act. Appointments are made by a Commissioner (or, on weekends, by a Superior Court judge) who compares a list of eligible defendants with a list of lawyers who have indicated their availability by telephoning the CJA office of the PDS between 7:45 a.m. and 8:15 a.m. that day. For the most part, names on the two lists are simply matched up in the order in which they

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[2] The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Supreme Court held that this provision required that counsel be provided whenever the defendant might suffer a loss of liberty.

appear until all the defendants have been provided counsel. The appointing official exercises some discretion, however, to assign a lawyer out of turn on the basis of the complexity of the case, the lawyer's known preferences, or the official's assessment of the lawyer's ability.

More than 1200 lawyers have registered for CJA appointments. In practice, however, most appointments go to a much smaller group of approximately 100 "CJA regulars," I.D.F. 18, who earn most or all of their income by representing indigent defendants. At least before the recent rate increase, the origins of which are at issue in this case, any lawyer who was interested in making a full time practice of CJA work could obtain a substantial caseload in a matter of weeks.[3] The CJA regulars accept CJA cases for a variety of reasons. Some of them have previous experience in public interest work and "consider representation of the poor [to be] the highest calling of the legal profession." I.D.F. 25. Some are motivated by an interest in criminal litigation. And some accept appointments under the CJA because there are no other legal jobs available to them. *Id.*

From 1970 until the boycott in 1983, fees for CJA cases were set at $30 per hour for time in court, and $20 per hour for other time, subject to a maximum of $1000 per case for felonies, $400 per case for misdemeanors, and $1000 per case for appeals.[4] The maximum compensation available to any individual for services provided under the Act was $42,000 per annum.[5] In order

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[3] I.D.F. 24; the record suggests that the CJA regulars received fewer appointments after the rate increase "whether they like it or not." Testimony of Perrotta at 677, JA 161.

[4] At the time of the boycott, D.C. Code Ann. § 11-2604(a) capped compensation at the hourly scale established by 18 U.S.C. § 3006A(d)(2), the federal CJA statute.

[5] Following the boycott, the limit was increased administratively to $50,000. *See* I.D.F. 29.

to get paid for CJA services, the attorney submits a voucher to the presiding judge showing the amount and nature of the time he or she spent on the case. The presiding judge has the authority to reduce the amount sought or, in particularly difficult or complex cases, to recommend to the Chief Judge compensation over the maximum per case limits. I.D.F. 27. Very few CJA regulars actually attained the annual maximum salary; one SCTLA member estimated that the average CJA lawyer made approximately $20,000 a year before the boycott. I.D.F. 29 & n.102. In 1982, the District paid CJA lawyers a total of $4,579,572.

As early as 1975, the level of CJA fees became an issue of concern among some members of the bar. In that year, the Report on the Criminal Defense Services in the District of Columbia by the Joint Committee of the Judicial Conference of the D.C. Circuit and the D.C. Bar (Unified) at 77 (Austern-Rezneck Report), concluded that CJA attorneys were inadequately compensated. The Austern-Rezneck Report found that the prevailing rates drove talented lawyers out of CJA practice, and encouraged those who remained to do a less than adequate job on their cases. *Id.* at 78-79. The report therefore recommended that the CJA rates be increased to $40 an hour for time in or out of court, subject to a maximum $800 for a misdemeanor case and $1000 for a felony case. The report further expressed the belief that these rates "represent[ed] the absolute minimum necessary to attract and hold good criminal lawyers and assure their ability to render effective representation to their clients." *Id.* at 84.

Nonetheless, in 1982 the CJA rates remained unchanged from the level that had prevailed when the Austern-Rezneck report was released in 1975. In March 1982, the Report of the D.C. Court System Study Committee of the D.C. Bar, reprinted as Senate Print 98-34, 98th Cong., 1st Sess., Comm. on Govt'l Affairs (Horsky

Report), recommended that all necessary steps be "taken by the Superior Court, the Mayor, and the D.C. Council to raise promptly the levels of compensation for attorneys appointed under the Criminal Justice Act to at least the levels proposed by the Austern-Rezneck Committee." *Id.* at 213. A bill increasing the hourly rate to $50 was then introduced in the D.C. Council, but it died in committee at the end of 1982 without a hearing. I.D.F. 36.

Meanwhile, in September 1982, petitioners Perrotta and Koskoff began a lobbying effort to increase the CJA compensation levels. Both petitioners, who were elected respectively President and Vice President of SCTLA in the fall of 1982, spent at least 90% of their time on CJA cases. I.D.F. 5-6. When they began their campaign, SCTLA was an informal association of CJA lawyers with no reliable membership list and no written by-laws. While the association kept a bank account, it did not enforce the rule that members pay $30 in annual dues. All CJA lawyers were allowed to participate in SCTLA meetings and to vote in SCTLA elections. I.D.F. 2-4.

Perrotta and Koskoff's early efforts included several conversations with Chief Judge Moultrie of the D.C. Superior Court, a meeting with Herbert Reid, Counsel to D.C. Mayor Marion Barry, and a strategy session with Wiley Branton, then Dean of Howard University Law School. Chief Judge Moultrie told Perrotta and Koskoff that he thought an increase in CJA compensation levels was deserved, but he declined to give any public support to pending legislation on the ground that, if such legislation were passed, his court might be called upon to determine its legality. Mr. Reid also expressed sympathy with their cause, but told them that the Mayor would not support the legislation without the urging of Chief Judge Moultrie. I.D.F. 37-39. Dean Branton advised that, since there was no organized and influential constituency to lobby for its passage, the prospects for an increase were poor unless the CJA lawyers did "something dra-

matic to attract attention in order to get any relief." I.D.F. 40.

In March 1983, D.C. Council Chairman Clarke introduced a new and less ambitious bill (No. 5-128), providing for a rate of $35 per hour for CJA work. This time the Judiciary Committee of the Council held a hearing at which numerous witnesses, including representatives of the SCTLA, various local bar groups, the PDS, the Executive Office of the D.C. Courts, and others testified in favor of the increase; no one testified against it except insofar as the Executive Branch of the D.C. Government raised concerns about funding it. Indeed, in June a member of the Council staff told Koskoff that there was no money available to fund the bill. This report was confirmed by the city's Budget Director, who claimed that the D.C. government supported the increase in principle. SCTLA's next effort, to interest the Congressional Appropriations Subcommittee on the District of Columbia in federal funding for a CJA increase, was rejected for want of an initiative either from the legislative or from the judicial branch of the D.C. government. Finally, in August 1983, Koskoff and petitioner Reginald Addison, Secretary of SCTLA, "buttonholed" the Mayor in the corridor of the District Building. Like everyone else, the Mayor expressed his sympathy but indicated that there was no money to fund an increa[illegible] I.D.F. 41-45.

At this point, petitioners turned from lobbying for legislation to increase their wages to organizing a boycott of further CJA appointments at the rates then being paid.[4]

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[4] Petitioners routinely used the word "strike" to describe their concerted refusal to accept new cases. Petitioners have not suggested, however, that they are "employees" within the meaning of § 20 of the Clayton Act, 29 U.S.C. § 52 (1982), which limits the granting of injunctions "in any case between an employer and employees, . . . involving, or growing out of, a dispute concerning terms or conditions of employment," or that SCTLA is a "labor organization" within the meaning

They formed a "Strike Committee," which promptly agreed that a boycott of new CJA appointments was the only way to get a rate increase and adopted as their goal rate increases to $55 per hour for court time and $45 per hour for other time. Petitioner Slaight was designated Chairperson of the Strike Committee. Other CJA lawyers were assigned the tasks of informing all CJA lawyers of the boycott, contacting lawyers who might act as supporters or "strikebreakers," soliciting the support of courthouse personnel, and contacting the media. I.D.F. 47.

On August 11, 1983, SCTLA held a meeting attended by about 100 CJA attorneys. Koskoff and Addison reported on their unsuccessful lobbying efforts. By voice vote, the lawyers resolved not to accept new cases as of September 6 if their rates had not been raised by then. Immediately following this meeting, Perrotta and David Hirsch, a Strike Committee member, drafted a petition declaring that:

> We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.

The petition, which was placed on the blackboard in the Lawyers' Lounge in Superior Court, was signed by a number of CJA attorneys. I.D.F. 48-49. On August 26,

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of § 6 of the same Act, 15 U.S.C. § 17 (1982), which provides that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help; . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." We therefore accept the FTC's considered characterization of SCTLA's action as a "boycott," as that term is used in antitrust parlance.

1983, Perrotta sent a letter to 40 D.C. law firms that had previously indicated a willingness to do *pro bono* work, urging them not to accept CJA cases during the boycott. I.D.F. 55.

Beginning on September 6, all but a few of the CJA regulars stopped accepting new appointments. The SCTLA Strike Committee actively sought to publicize the boycott by handing out press kits, organizing picket lines, and staging rallies. Several CJA attorneys were interviewed on television and radio. This activity was "all designed to educate the general public about the plight of the CJA lawyers in the expectation that this would result in additional pressure on the District government to increase fees." I.D.F. 58.

The boycott had a severe impact on the criminal justice system, since there was no off-setting cessation of law enforcement activity. Thus, indigent defendants continued to be brought before the court in proceedings that required the services of a lawyer. After only a few days of the boycott, the PDS was swamped with cases. The response of the "uptown" bar to PDS's call for help was inadequate to meet the need for lawyers, reflecting, the Administrative Law Judge (ALJ) found, "their universal distaste for criminal law, their special aversion for compel' i indigency representation, the near epidemic siege of self-doubt about their ability to handle cases in this field, and their underlying support for the demands of the CJA lawyers." I.D.F. 60.

On September 15, 1983, the PDS leadership sent a hand-delivered letter to the Mayor, Chief Judge Moultrie and Councilmember Rolark, who chaired the Judiciary Committee, apprising these officials of "the extremely serious situation that has now developed with respect to the legal representation of indigents in criminal and juvenile delinquency cases in the Superior Court of the District of Columbia." The letter noted that the re-

sources of the PDS had been "taxed to a point where as of the beginning of next week it can no longer provide this quantity of assistance to the criminal justice system while continuing to render quality, effective legal representation." With respect to the assistance received from members of the private bar, the PDS noted that "[t]he daily need for representation of indigent defendants (sometimes over 80 such cases a day) has at this point seriously depleted the resources of the private bar who have volunteered to help the court. This leads the Service to conclude that future assistance from this source is problematic, at best." In conclusion, the letter urged the officials to "decide on an immediate course of action to address the situation" and suggested that "[a] public declaration of your unified support for [Bill No. 5-128] and of specific efforts to effect its enactment would, we believe, help greatly to resolve the present situation." I.D.F. 61. Chief Judge Moultrie confirmed to the Mayor the PDS's claim that the criminal justice system was approaching a crisis point. I.D.F. 62.

In response to the letter from the PDS, the Mayor sought and had a meeting with Koskoff, Perrotta, and Addison that evening. He agreed to express his support for Bill No. 5-128 and noted that the matter could be taken up as emergency legislation and enacted and signed on September 20. The Mayor also agreed to support introduction of a second bill, which would have to go through the normal legislative process, to increase CJA fees further to $55 for court and $45 for other time. The next day, September 16, the Mayor wrote to Councilmember Rolark to indicate his support for and willingness to fund the increased costs of Bill No. 5-128. Council Chairman Clarke and Councilmember Rolark agreed to expedite its passage on an emergency basis. Later that afternoon, the two legislators appeared at a meeting of CJA attorneys where they presented the $35 proposal as a "take it or leave it proposition." I.D.F. 63-65.

On September 19, 1983, SCTLA held a meeting to consider the City's proposal. A majority of the more than 100 CJA attorneys in attendance voted to accept the offer. After this decision was communicated to Councilmember Rolark's office, the Judiciary Committee convened and reported out Bill No. 5-128. The next day, the D.C. Council passed the bill unanimously. I.D.F. 66-68. On September 21, 1983, the CJA attorneys began accepting new assignments. I.D.F. 69.

II.

In the wake of these events, the FTC filed a complaint alleging that the petitioners had engaged in "a conspiracy to fix prices and to conduct a boycott" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits "[u]nfair methods of competition," including restraints of trade in violation of the Sherman Act, 15 U.S.C. § 1 (1982). *See FTC v. Cement Institute*, 333 U.S. 683, 694 (1948).[1] The case was referred to an ALJ who conducted an extensive hearing and issued an initial decision. Relying primarily on the Commission's then-recent decision in *Michigan State Medical Society*, 101 F.T.C. 191 (1983), the ALJ rejected the petitioners' contentions that their conduct was either political activity exempted from the antitrust laws by the First Amendment or that it was a form of petitioning for legislative change, and as such immune from antitrust liability under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The ALJ also concluded that the petitioners' interest as professionals in ensuring that the Sixth Amendment rights of their clients were not jeopardized

[1] The complaint is based upon petitioners' "coercive, concerted refusal to deal [*i.e.*, to accept new cases] for the purpose of increasing the CJA fees," and "not upon their price agreement alone nor upon their preboycott collective efforts to persuade the city government, solely by the force of argument, to raise the fees." FTC Decision, 107 F.T.C. at 573.

by inadequate CJA rates did not exempt their boycott from the antitrust laws; he characterized the claim to the contrary as "simply a restatement of the argument that professional status alone merits a total antitrust exemption," which was rejected in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Nonetheless, the ALJ dismissed the Commission's complaint on the "pragmatic basis" that "there was no harm done." This observation was itself based on the evidence showing that "city officials (and practically everyone else concerned with the criminal justice system)" believed that the prevailing rates were "inadequate to satisfy the 'political' (*i.e.*, constitutional) requirement of effective representation" and that "the CJA lawyers were unlikely to achieve higher fees if they continued to rely on communicative political petitioning alone."

On appeal, the Commission affirmed the ALJ's rejection of the petitioners' defenses but reversed his finding on liability. FTC Decision, 107 F.T.C. at 562-63. The Commission found that:

> [T]he city's purchase of CPA legal services for indigents is based on competition. The price offered by the city is based on competition, because the city must attract a sufficient number of individual lawyers to meet its needs at that price. The city competes with other purchasers of legal services to obtain an adequate supply of lawyers, and the city's offering price is an element of that competition. Indeed, an acknowledgement of this element of competition is implicit in the respondents' argument that an increase in the CJA fee was "necessary to attract, and retain, competent lawyers." If the offering price had not attracted a sufficient supply of qualified lawyers willing to accept CJA assignments for the city to fulfill its constitutional obligation, then presumably the city would have increased its offering price or otherwise sought to make its offer more attractive. In fact, however, the city's offering price before the boycott apparently was sufficient to obtain the amount and quality of legal services that it needed.

Id. at 570-71. Petitioners, who are "competitors, individual entrepreneurs, selling their services to the District of Columbia," had engaged in a "coercive, concerted refusal to deal" in an attempt to restrain competition among themselves. *Id.* at 571, 573. Because their boycott had "the purpose and effect" of raising prices, the Commission concluded that it was illegal *per se*, that is, constituted a facially anticompetitive agreement. *Id.* at 572-75. Under the alternative Rule of Reason analysis, the Commission held that SCTLA had failed to establish any "countervailing competitive justifications" for the boycott; it rejected the suggestion that the boycott "would result in higher quality legal services" on the ground that it was irrelevant under the teaching of *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). *Id.* at 576-77.

The Commission also rejected the ALJ's finding that the boycott did not have an anticompetitive effect, noting that the rate increase required the city government to spend an additional $4 to $5 million a year for CJA legal services. As for the ALJ's finding that "the city [was] supportive of the boycotters' demands," the Commission found that it was not supported by the record—which "shows that the District government increased the fees . . . only when it was coerced"—and that, even if proved, "the acquiescence or support of some members of the city government would not immunize the [petitioners'] boycott to increase prices from the antitrust laws." *Id.* at 577-78.

The Commission then considered the petitioners' claim that their activities were immune from the antitrust laws by virtue of the First Amendment. The Commission concluded that petitioners were not entitled to the protections extended to participants in political boycotts, because:

> [T]he boycott of the CJA program was agreed upon among competitors and was designed to restrain competition for their direct economic benefit. The members of SCTLA explicitly sought to force concessions from the District government in its role as a buyer of services rather than its role as a policy maker.

Id. at 582, 583-89. Nor did their boycott fall within the antitrust immunity established in *Noerr* for concerted action to influence government decision-making. First, the FTC held, *Noerr* applies to efforts to solicit anticompetitive government action through lobbying or publicity, not by means of a coercive boycott. *Id.* at 589-95. Second, the anticompetitive effects of the petitioners' boycott resulted directly from the collective action of the boycotters and not, as in *Noerr*, from the independent action of the government: "The restraint was *on* the government, not *by* the government." *Id.* at 597 (emphasis in original). Finally, the FTC found no policy reason for granting an immunicy from antitrust liability simply because the government rather than a private party was harmed by the boycott. The Commission therefore concluded that "[t]he mere fact that the government, as the only purchaser of CJA services, was the target does not protect their boycott from regulation." *Id.* at 599.

Having determined that the boycott was an unreasonable restraint of trade and that it was not protected by the First Amendment, the Commission entered an order requiring the petitioners to cease and desist from various boycott-related activities, compelling SCTLA to notify its members of the Commission's decision, and imposing upon the individual petitioners a duty to notify the Commission of changes in the nature of their legal practice for a five year period.

III.

Petitioners raise a number of closely related objections to the FTC decision, but they do not seriously dispute

that, if their conduct can properly be viewed through the ordinary lens of antitrust law, it constitutes an unreasonable restraint of trade. Instead, they argue strenuously that conventional antitrust analysis focuses attention on factors that are irrelevant in the peculiar market for their services—where demand is set by the requirements of the Sixth Amendment and price is set by the legislature—and overlooks the truly important First Amendment issues raised by the political conduct and context from which this case arises. Thus, they argue generally that they are immune from antitrust liability by reason of the *Noerr-Pennington* doctrine, which applies to those who would petition government to redress their grievances; specifically, they argue that the boycott was political activity protected under *Noerr*, notwithstanding its coercive element, because it was designed to influence the passage of legislation. In the same vein, even if *Noerr* does not apply to all conduct designed to influence the legislature, "then it is necessary, in order to avoid trenching excessively on First Amendment interests, to create an exception [from the antitrust laws] for nonviolent expressive conduct on issues of public concern."

As a further alternative, petitioners argue that "the Commission erred in failing to undertake an analysis of [their] market power." They argue that a *per se* rule is inappropriate as a matter both of antitrust and of constitutional analysis; and that, if the FTC is remitted to a Rule of Reason analysis, then "no antitrust violation can be found" because "the record clearly demonstrates the absence of market power."

We agree with petitioners in one important regard: the Commission must apply the antitrust laws to the facts of this case with a special solicitude for the First Amendment rights of these petitioners and others who, like them, engage in concerted action to advance both their political agenda and their own economic welfare at

the expense of government. Unlike petitioners, however, we infer from this not that the government, in its role as a purchaser of goods and services, is left unprotected by the antitrust laws. Instead, we think it both necessary and sufficient that those laws be applied prudently and with sensitivity. In this instance, such prudence and sensitivity require that the FTC prove that petitioners had economic power in a relevant market, even though such a showing is generally not required when competitors attempt to raise price by jointly refusing to deal with a would-be customer. Otherwise, there is simply too much risk that the antitrust laws will be used to penalize those who are able, through collective action, to wield political power in a way that serves their economic interest.

We consider first then whether, apart from any First Amendment protection to which it may be entitled, the SCTLA boycott was in violation of the antitrust laws. Like the Commission, we believe that petitioners' boycott constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act. Agreements among competing suppliers to restrict the available quantity of their product displace competition and thus tend to force up prices. This constriction of supply is the essence of "price-fixing," whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218-23 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 394, 397-98 (1927); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 410-12 (1921); *San Juan Racing Ass'n, Inc. v. Asociacion de Jinetes de Puerto Rico, Inc.*, 590 F.2d 31 (1st Cir. 1979). In this case, there is no room for doubt that there was a legally sufficient agreement among the defendants to restrict the supply of their services; the individual petitioners do not deny that they agreed among

themselves to withhold their services from the District of Columbia, a willing purchaser. This agreement was made at the SCTLA meeting of August 11, 1983, memorialized in the petition drafted by Perrotta, and implemented through the efforts of the Strike Committee. Nor is there any doubt that restraining competition in the market for their services was one of the purposes of the petitioners' conduct. Both the ALJ and the Commission found what the record clearly reflects, *viz.*, that the petitioners expected their boycott to disrupt the administration of the District's criminal justice system; to that end tried to dissuade non-SCTLA lawyers from taking CJA cases in their stead, which is to say, from competing with them; and intended the resulting pressure to force the District to accede to their demand for increased compensation.[8]

Petitioners suggest that this sort of traditional antitrust analysis should not be applied to what they characterize as a "totally non-traditional market." We are not at liberty, however, to suspend the application of the antitrust laws to particular markets that we might view as being "non-traditional." The antitrust laws prescribe competition in all markets, in all seasons, except as Congress may provide an exception.[9] Instead, it is our task to apply the antitrust laws in a discriminating manner that responds to the peculiar characteristics of the market in question, as it is the task of learned counsel for

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[8] The finding that the boycott was intended to "coerce" the city into agreeing to a rate increase is not inconsistent with the petitioners' claim, discussed *infra* in sections V and VI, that their actions also served as a means of dramatizing their opposition to the prevailing rates.

[9] *Cf. Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200 (1922) (national pastime not "commerce" within Sherman Act); *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972) (acknowledging that professional baseball is "engaged in interstate commerce" but leaving to Congress any change in the "aberration" established by *Federal Baseball*).

petitioners to identify any peculiarities of that market that may require a departure from the usual analysis.

Here, petitioners suggest that one cannot find "traditional price-fixing" because "the 'price-fixing' has been done by the D.C. City Council through legislation." In addition, we are told that the demand for CJA services is not the product of "traditional market forces" because it is generated by the Sixth Amendment requirement that the government make available counsel to criminal defendants who cannot otherwise afford a lawyer. In sum:

> [T]he total picture is a price-fixed market in which the suppliers are price takers, the consumers (i.e., the creators of demand) pay nothing, and the third-party payor (the D.C. Government) is a compulsory market participant, not a competitive insurance carrier.

Pet. Reply at 4.

But there is nothing in any of this that would justify a departure from conventional antitrust analysis. The Commission correctly determined that the CJA regulars act as "competitors" in the only sense that matters for antitrust analysis: They are individual business people supplying the same service to a customer, and as such may be capable, through a concerted restriction on output, of forcing that customer to pay a higher price for their service. That the D.C. government, like the buyers of many other services and commodities, prefers to offer a uniform price to all potential suppliers does not alter in any way the anti-competitive potential of the petitioners' boycott.[10] The antitrust laws do not protect only

[10] We do not read petitioners' characterization of the market for CJA services as "*price fixed*," to suggest that the District of Columbia is a "monopsonist," *i.e.*, that it is the near exclusive purchaser of their services and is therefore capable of exerting market power over the price they are paid for their work. The record would not support such a claim, nor have petitioners argued that it is a defense (which would surely fail) that the victim of the boycott possessed monopsony power. *See Keifer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951) (no defense of price-fixing by manufacturers that wholesale purchasers had fixed resale prices).

purchasers who negotiate each transaction individually, instead of posting a price at which they will trade with all who come forward. Nor should any significance be assigned to the origin of the demand for CJA services; here the District may be compelled by the Sixth Amendment to purchase legal services, there it may be compelled by the voters to purchase street paving services. The reason for the government's demand for a service is simply irrelevant to the issue of whether the suppliers of it have restrained trade by collectively refusing to satisfy it except upon their own terms.[11] We therefore conclude, as did the Commission, that the petitioners engaged in a "restraint of trade" within the meaning of Section 1.

Of course, the Sherman Act condemns only "unreasonable" restraints of trade. *See Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). Determining whether a restraint is unreasonable generally requires that it be examined in the context of the particular industry on which it operates, and that its anticompetitive potential be weighed against any procompetitive justifications that can be offered on its behalf. *See Chicago Board of Trade*, 246 U.S. at 238. "Business certainty and litigation efficiency," however, require that agreements "that would always or almost always tend to restrict competition and decrease output," be condemned *per se*, that is, without an elaborate analysis of the industry or even careful consideration of the proffered

[11] Any individual lawyer is free to decline work at an unacceptable price, of course; the Sherman Act operates only against contracts, combinations, and conspiracies, and attempts thereat.

justifications for the restraint. *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 344 (1982); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979) (*BMI*).

The Commission concluded that petitioners' concerted effort to raise the price of their service merited such *per se* condemnation. A price-fixing boycott is typically disposed of summarily under the Sherman Act, because, as the Supreme Court has consistently held, "the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular industry." *National Collegiate Atheletic Ass'n v. Board of Regents*, 468 U.S. 85, 100 n.21 (1984) (*NCAA*); *see Maricopa County*, 457 U.S. at 351; *BMI*, 441 U.S. at 19-20; *Professional Engineers*, 435 U.S. at 692.[12]

We recognize that the application of the *per se* rule to horizontal agreements, including boycotts, has become increasingly less rigid in recent years. This development was discussed in detail in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 223-29 (D.C. Cir. 1986). There we observed that several Supreme Court cases, most notably, *United States v. Topco Associates*, 405 U.S. 596 (1972), and *United States v. Sealy Corp.*, 388 U.S. 350 (1967), insofar as they appeared to hold that *any* horizontal restraint was a *per se* violation of section 1, "must be regarded as effectively overruled" by more recent decisions. *Rothery*, 792 F.2d at 226. *BMI*, 441 U.S. at 1; *NCAA*, 468 U.S. at 85; and *Northern*

[12] The conclusion that a restraint is illegal "*per se*" may mean not only that the court will not consider any justification offered in support of it but also that it may be condemned without any proof that it had an adverse effect on competition. The issue of whether the Commission must prove "market power" or price "effect" on the facts of this case is discussed *infra* in section VI.

Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985), have decidedly shortened the reach of the *per se* rule. In the first two of these cases, the Court declined to apply the rule to horizontal arrangements affecting price or quantity, in each case reversing the court of appeals' "literal approach" to price-fixing on the ground that "the challenged practices may have redeeming competitive virtues." *BMI*, 441 U.S. at 9, 13; *NCAA*, 468 U.S. at 100-04. Indeed, in *Pacific Stationery*, the Court again reversed the lower court's *per se* analysis, this time of a "group boycott" by a wholesale purchasing cooperative that expelled one of its members for failing to comply with a rule. The Court noted that "such cooperative arrangements would seem to be 'designed to increase economic efficiency and render markets more, rather than less, competitive'" because they permit "the participating retailers to achieve economies of scale . . . , and also ensure[] ready access to a stock of goods that might otherwise be unavailable on short notice." 472 U.S. at 295 (quoting *BMI*, 441 U.S. at 20). Moreover, "[w]holesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively." *Id.* Accordingly, "[t]he mere allegation of a concerted refusal to deal does not suffice" to trigger the *per se* rule, "because not all concerted refusals to deal are predominantly anticompetitive." *Id.* at 298.

The Supreme Court's manifestly heightened concern with the effect of the *per se* rule on economic efficiency is not sufficient, however, to put this case beyond the grasp of that rule. As *Rothery* noted, the Court's recent cases have all examined the economic wisdom of the *per se* rule in the context of horizontal restraints that were "ancillary" to "an integration of the economic activities of the parties and appear[ed] capable of enhancing the group's efficiency." *Rothery*, 792 F.2d at 229. Here, by contrast, petitioners have advanced no claim that their

boycott was ancillary and necessary to some larger, cooperative venture that permitted them to operate more efficiently. Instead, restraining competition and thus raising price was the *raison d'etre* of the boycott. Nothing in the two intervening Terms of the Supreme Court suggests a need to qualify our observation in *Rothery* that (as Judge Taft had seen from the outset), "a naked horizontal restraint, one that does not accompany a contract integration, can have no purpose other than restricting output and raising prices, and so is illegal per se." *Id.* at 229 (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)).

Perhaps economic efficiency is not the only garb in which an otherwise naked restraint can be made respectable in a civilized society, however. Petitioners seek to wrap themselves in the mantle of the Sixth Amendment, and when the constitutional rights of their clients are invoked, we are indisposed to disregard their argument merely because it is novel or would require us to acknowledge a new exception to the *per se* rule. Efficiency may indeed be the only rationale intrinsic to the logic of the antitrust laws for exempting a horizontal restraint from *per se* condemnation. If the integrity of the Sixth Amendment right to counsel requires it, though, we should not shrink from acknowledging a constitutional limitation on the reach of the *per se* rule. Nor does the *per se* rule bar us from evaluating a novel and potentially significant defense. For, as Professor Areeda has noted, "[c]ourts do not ordinarily mean to preclude themselves from future thoughts about new matters which have not previously been considered." VII P. AREEDA, ANTITRUST LAW ¶ 1510a at 416 (1986). Moreover, considering petitioner's justification does not threaten to enmesh us in an "elaborate industry analysis." *Professional Engineers*, 435 U.S. at 692. In *Professional Engineers*, for example, the Supreme Court indulged in a limited evaluation of

the non-efficiency justification proffered by the defendant. Although the Court ultimately rejected the defendant's safety rationale for displacing *per se* condemnation with Rule of Reason analysis, *see id.* at 693-95, we can hardly give shorter shrift to an argument based upon the constitutional right to counsel.

Petitioners' argument proceeds as follows: SCTLA's boycott was really a protest responding to "a 'market failure' situation brought on by the D.C. Government's inflexible pricing scheme." Such protests against government pricing policies "are in fact carried out by picturesque 'small people' in the Jeffersonian tradition—independent farmers [spilling milk to protest government price support levels and] gasoline station operators [closing to protest price regulations limiting their markup]." Such actions aim to benefit consumer welfare by offsetting a "market failure due to government action." According to petitioners, "[g]overnments frequently distort markets by setting prices, rationing, or regulating prices—because competitive pricing would produce 'politically unacceptable' results." In this case, we are told, "competitive pricing" was politically unacceptable to the D.C. Government because of the underlying antipathy of the taxpaying (and voting) public to the rights of indigent defendants. This antipathy induced the District to set the CJA rates at a level that was too low to provide the effective representation mandated by the Constitution. Since persuasion was unlikely to alter this politically popular but constitutionally dubious result, coercion by the only means available, a collective boycott, was necessary to raise the prevailing rates to the "competitive" price.

Although the matter is not entirely free from doubt, we interpret the "competitive price" in this argument to mean either the price that defendants would willingly pay for counsel if only they were not indigent, or at least what is surely a lesser amount, the price necessary to

call forth an adequate supply of legal representation of a quality sufficient to secure the constitutional right to effective assistance of counsel.

Before we evaluate the validity of this defense against the *per se* rule, we pause briefly to discuss a fundamental premise upon which the petitioners rely, *viz.*, that increasing the hourly rate for CJA legal services would improve the quality of representation to indigent defendants. The FTC has not seriously challenged this assumption, but neither has the SCTLA attended much to establishing the relationship it assumes between the price and the quality of CJA lawyering. It is easy enough to imagine that an increase in the ceiling on compensation for each case would lead to better representation since attorneys would be able to devote more hours to each case without fear of being denied payment for their efforts; this would be true if the per case ceiling was a constraint in a significant number of cases. But the ceiling on compensation was, at best, a minor reason for the boycott. As the SCTLA petition noted, the major purpose of the boycott was obtaining "a substantial increase in [the] hourly rate."

It is not immediately clear whether increasing the hourly rate paid to CJA regulars would increase the quality of the services they provide.[13] The record is not entirely barren on this point. Some witnesses suggested

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[13] *Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976) (rejecting a claim that a ban on advertising by pharmacists was necessary to ensure quality and noting that "[t]here is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event. The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service.")

that higher hourly rates would enable attorneys to take on fewer cases and thus, perhaps, to provide better service because their attention would be less fragmented.[14] On the other hand, one of the leaders of the SCTLA boycott testified that the increased rates made it possible for him to pay for support services that, in turn, enabled him to take on more cases.[15] But it is surely fond for us to speculate whether increased fees produce more or less effort on behalf of clients; economists have been unable to determine *a priori* the effect of increased wages on the trade-off between leisure and work,[16] and we can hardly purport to do so on the basis of a record developed with other questions principally in mind.

It is easier to see why increasing CJA rates might improve the quality of legal services, however, when one considers the effect of the rate increase on the size and quality of the pool of attorneys willing to take on CJA work. The leaders of the SCTLA boycott quite reasonably expected that a significant rate increase would induce more attorneys to take on CJA cases. Indeed, some CJA regulars opposed the boycott for just that reason.[17] This expectation and fear was fully realized. There has been a substantial increase in the number of attorneys willing to take CJA cases, and a corresponding decrease

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[14] *See, e.g.*, Testimony of Cheryl D. Stein at 61, JA 446; Testimony of Slaight at 81, JA 473; *cf.* Testimony of Perrotta at 729, JA 195 (increased respect from judges).

[15] *See* Testimony of Addison at 886-88, JA 254-56.

[16] *See, e.g.*, P. SAMUELSON, ECONOMICS at 579-80 (10th ed. 1976); A. ALCHIAN & W. ALLEN, UNIVERSITY ECONOMICS at 462-64 (1964).

[17] *See* Testimony of Perrotta at 123, JA 498 ("As a matter of fact, one of the interesting things about the work stoppage . . . was that there were some people, fringe people, in terms of competence and skill who were against it for precisely that reason, that they felt that there would be more competition and that they would end up getting fewer cases.")

—it is not clear whether voluntary or involuntary—in the caseloads of the old regulars.[18] It is inferable that the lawyers newly attracted to CJA work by the increased hourly rates had been able to earn more in other types of practice than they could in CJA work under the pre-boycott rate schedule; insofar as lawyers respond to pecuniary incentives, as opposed to the other compensations they may derive from their work, it is reasonable to suppose that the lawyers attracted to CJA work at the higher rates were, in market terms, better lawyers. (Of course, it is possible in the representation of indigent criminal defendants that humanitarian instincts or ideological zeal contribute more to the quality of representation than the talents of lawyers that are brought out only by higher wages; still, even altruists must often feed a family and so respond, at the margin, to increased incentives.) And as the ALJ noted, while "a dramatic transformation in the quality of indigency practice is unlikely," the increased rates might provide an incentive for the more dedicated CJA lawyers to remain in the practice for a longer period of time. I.D.F. 72. These factors suggest that the quality of CJA services is likely to be improved in some indeterminate degree by a rate increase and we will assume, for the present discussion, that this is so.

We must next consider whether such an increase in quality can justify petitioners' boycott. The Commission concluded that it could not, relying primarily upon *Professional Engineers*. In that case, the Court considered a provision in the Society's "canon of ethics" that effectively prohibited competitive bidding by its members. In its defense, the Society suggested that under the Rule of Reason the canon was justified because "competitive pres-

[18] Testimony of Perrotta at 677, JA 161 (100-120 lawyers call in for cases daily whereas 40-60 did so before rates were increased; lawyers get fewer cases "whether they like it or not").

sure to offer engineering services at the lowest possible price would adversely affect the quality of engineering," and thus endanger public safety. 435 U.S. at 685. The Court accepted the posited relationship between price and quality, and the risk that could result, but noted that, in the absence of the canon, a purchaser could always choose to forgo the price advantages of competitive bidding in order to improve the quality of the product, and an individual seller of professional services could independently refrain from bidding for work. *Id.* at 694. The Court therefore found the Society's ethical canon to be unreasonable. The ban on competitive bidding imposed the seller's "views of the costs and benefits of competition on the entire marketplace," and conflicted with the legislative judgment embodied in the Sherman Act that competition "will produce not only lower prices, but also better goods and services." *Id.* at 695.

The argument advanced by the defendants in *Professional Engineers* constituted, in the words of the Supreme Court, "a frontal assault on the basic policy of the Sherman Act." *Id.* at 695. For the engineers were far from unique in being able to posit at least a plausible relationship between the quality of their product and the elimination of competition. As the Court noted:

> Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy, the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.

Id. at 695-96. We need hardly add defective legal representation of a criminal defendant to the court's list of potentially harmful goods and services.

To be sure, SCTLA makes a more limited claim regarding the quality of their services than that advanced by the Society of Professional Engineers: Petitioners here claim only that the usual assumption that competition will produce "better goods and services" does not apply where the market price is subject to the distorting influence of the "political process," and is particularly inapplicable where the polity is a purchasing agent for the least influential segment of society, indigents accused of crimes. The difficulty with this theory is immediately apparent, however, when one considers how a court is to evaluate a claim that the political process had failed to arrive at the "competitive price." No doubt most business people who sell to the government are of the opinion that they could better serve the public if only the price of their goods or services were increased. Many of them may also be able to show that price is kept down by the force of the "political pressure" exerted by some group with opposing interests—such as taxpayers. Doctors who provide medical services to beneficiaries of the Medicaid program, for example, may be able to show that the rates of reimbursement set by the federal government fall below the price they charge for high quality medical services in the competitive market, and that they systematically skimp in their treatment of Medicaid patients as a result. Moreover, they may be able to show that the rates for reimbursement of participating doctors are held down by the unwillingness of taxpayers to respond sympathetically to the medical needs of the indigent. Regardless of how conclusive their evidence, however, the judicial branch is not licensed to pass judgment upon the adequacy of the expenditures authorized by the political branches of government except in those rare cases (of which more below) where there is a constitutionally mandated standard that sets the minimum level of service that the state must provide.

Petitioners may choose to call it a "market failure" when the political process responds less to the demands

of the weak—although it seems to be more of a tautology than a description—but call it what one will, courts are in no position to determine whether such a "failure" has occurred, much less to remedy it by handing out exemptions from the Sherman Act. Nor are we prepared to take the admittedly more manageable but even less responsible course of simply permitting all coercive boycotts aimed at a government. Congress surely did not mean to leave governments so vulnerable to extortion by the suppliers of the goods and services they need. There is, then, no general exception to *Professional Engineers* for restraints of trade aimed at prices set through the political process.

Without emphasizing the point, petitioners have at times suggested that their boycott was necessary to vindicate the constitutional rights of their clients, *i.e.*, that the pre-boycott rates they were paid did not elicit the constitutionally required minimum level of legal assistance for the accused.[19] We recognize that the legislature may be required to alter its level of spending in order to accommodate rights grounded in the Constitution. If, for example, the political process results in conditions of confinement that do not satisfy the standards of the Eighth Amendment, the courts may order remedial steps that in effect require the government to devote additional resources to the prison system. In such cases, the constitutional provision establishes a standard by which the

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[19] Petitioners put into the record a letter from the Director of the Administrative Office of the United States Courts to the Speaker of the House (April 7, 1983) urging, on behalf of the Judicial Conference of the United States, passage of legislation increasing the per case maximum and authorizing the Conference to adjust the hourly rate for work done under the federal version of the CJA, and observing "increasing concern at all levels of the Federal Judiciary that further delay . . . may significantly erode the quality of legal services which the Sixth Amendment to the Constitution mandates." Resp. Exh. 40, JA 672.

court can evaluate the choices of the political branches. Even there, we note, a court would not ordinarily have reason to order a specific level of expenditure, since it can instead specify the condition to be achieved and leave it to the government to fulfill that condition in the most economical way it can find.

Since they have not argued the point, however, we need not decide the novel question whether a contract, combination, or conspiracy that would otherwise be an unlawful restraint of trade under the Sherman Act may be justified on the ground that it was necessary to vindicate the constitutional rights of others.[20] Counsel for the petitioners acknowledged at oral argument before the Commission that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of their clients. *See* 107 F.T.C. at 587.[21]

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[20] The Commission takes the position that the boycott would not be justified even if "denial of Sixth Amendment rights was rampant" since "the remedy for such an evil would still lie with the three branches of government, not with a suppliers' cartel." FTC Brief at 35-36 n.35 (citing *Fashion Originator's Guild, Inc. v. FTC*, 312 U.S. 457, 467-68 (1941)).

[21] The Commission specifically found that the quality of representation before the boycott was "adequate under Sixth Amendment standards." *See* 107 F.T.C. at 587. In support of this finding, it cited to the decision of the ALJ at I.D.F. 25, but the ALJ there concluded only that "[o]n the basis of this record, no definitive finding can be made about the performance of CJA lawyers in handling their caseloads except to observe that collectively they move a large volume of cases through the District's criminal justice system"; that they are of uneven quality and have diverse motivations for doing CJA work; and that "the CJA corps still has its fair share of courthouse 'hangers-on' who take as many cases as possible (usually misdemeanors) in the expectation that without investigation, preparation, or concern for the particular needs of their clients, their cases will plead out, and hassles with Bar Council over charges of ineffective representation

It may be true, as the amicus American Civil Liberties Fund of the National Capital Area suggests, that SCTLA was reluctant to introduce evidence demonstrating that its members committed legal malpractice on a regular basis. Surely less would have been required, though. For example, petitioners could have argued that the per case ceiling was inherently inadequate to allow for effective assistance in some cases without exposing themselves to any embarrassment. They could likewise have argued that the quality of low-paid representation falls below the constitutional minimum without inviting criticism by referring to statistics on cases pleaded instead of tried, in comparison with other jurisdictions, and such other indices as accomplished counsel could devise under the spur of incentive. Instead, they have simply not pursued the argument, and their occasional references to the constitutional underpinnings of their boycott are but so much parsley to garnish the arguments they have made. Thus, we decide this case as it comes to us, upon a record that does not support, and by petitioners who do not

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will be avoided as a living is scratched out collecting CJA fees."

Nor can the low rate of reversals of criminal convictions on Sixth Amendment grounds, upon which the FTC drew, provide substantial support for the Commission's finding. A conviction may be affirmed despite the substandard performance of counsel unless the court determines that this performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). Advising a client to accept the offer of a bargained plea will occasion even less rigorous judicial second-guessing when the defendant later seeks a writ of habeas corpus, claiming ineffective assistance of counsel. It does not follow, apodictically, therefore, that "[i]f the city's fees for CJA lawyers had been inadequate to elicit competent counsel for indigents, a history of reversals of criminal convictions on Sixth Amendment grounds would have signalled that inadequacy." 107 F.T.C. at 587.

seek, a finding that the pre-boycott rates resulted in systematic violations of the Sixth Amendment.

To summarize thus far, we hold that the SCTLA boycott was an unlawful restraint of trade. Since no "procompetitive" justification, that is, no justification that is consistent with the purposes of the antitrust laws, has been offered in its defense, and no constitutional barrier has been interposed, the boycott could properly be condemned as a *per se* violation of Section 1 of the Sherman Act, unless it also comes within the protection of the First Amendment.

IV.

We next consider whether the boycott may be immune from the Sherman Act as an exercise of the petitioners' constitutional rights to speak and to petition the government for the redress of their grievances. Relying upon the Supreme Court's decisions in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the petitioners argue that nonviolent conduct, including a suppliers' boycott, designed solely to influence the passage of legislation, is protected from the proscriptions of the antitrust laws. In the alternative, petitioners argue that the Commission, at a minimum, must "create an exception for non-violent conduct designed to dramatize public issues (*i.e.*, issues of interest to a broader group than the boycotters themselves)."

The plaintiffs in *Noerr*, a number of truck operators and their trade association, alleged that a group of railroads had conspired to monopolize the long-distance freight business by conducting a publicity campaign aimed at encouraging the adoption of laws and law enforcement practices destructive of the trucking business. 365 U.S. at 129. The Court thought it clear, for two reasons, that "the Sherman Act does not prohibit two or

more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136. First, the Court stressed the desirability, in a representative democracy, of allowing interested parties to make their views known to the government:

> [To] hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act.

Id. at 137. Second, the Court noted that:

> The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 138. In response to the charge that the railroads had intended their publicity campaign to hurt the truckers directly by damaging the goodwill of their customers and of the public, the Court held that any such "direct injury" was merely "an incidental effect of the railroads' campaign to influence governmental action." *Id.* at 143. The prohibitions of the Sherman Act would be applicable only if a publicity campaign ostensibly directed toward influencing governmental action were a "mere sham." *Id.* at 144.[22]

Petitioners would assimilate their boycott to the protected lobbying activity considered in *Noerr*, on the ground that the *Noerr* Court distinguished broadly be-

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[22] The result in *Noerr* was extended in *United Mine Workers v. Pennington*, 381 U.S. 657, 669-71 (1965), to anticompetitively motivated efforts to influence administrative action.

tween "business activity" and "political activity," and held that the Sherman Act was intended to regulate the former but not the latter. SCTLA argues that "the teaching of *Noerr* is that the right to petition is of sufficient importance that genuine efforts to influence the legislature are not subject to the antitrust laws, even if in the process they result in ancillary anticompetitive effects in the marketplace that would otherwise constitute an antitrust violation." Since the SCTLA boycott was clearly an effort to influence the legislative process, SCTLA asserts that it qualifies as "political activity" exempt from the Sherman Act.

In evaluating petitioners' argument, we note first that nothing in *Noerr* itself suggests that, by distinguishing between "business" and "political" activity, the Court intended to remove from the reach of the Sherman Act all conduct that is aimed at obtaining favorable legislation. Indeed, the *Noerr* court specifically distinguished between lobbying and boycotts. Collective efforts to persuade the legislature or the executive to take particular action, the Court said:

> bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

365 U.S. at 136 (citations omitted).

Were we guided solely by *Noerr*, therefore, we would be disinclined to accept the expansive immunity claim advanced by petitioners.[23] Happily, any lingering doubt

[23] Indeed, lower courts have declined to interpret *Noerr* in the fashion suggested by petitioners. Thus, *Noerr* immunity has been denied to lobbying efforts that use undesirable methods without regard to whether the participants' desire to influence the government was "genuine." *See Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir. 1971) (*Noerr* and *Pennington* do not apply to "threats, intimidation and other coercive measures"); *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 716 (8th Cir. 1982) (*Noerr* does not apply to lobbying efforts accompanied by illegal or fraudulent actions); *see also Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971) (*Noerr* does not protect a conspiracy to supply false information to a government agency).

A small number of cases have considered whether *Noerr* protects boycotts by competitors aimed at influencing governmental action. The majority of these decisions have concluded that it does not. *See United States v. North Dakota Hospital Ass'n*, 640 F. Supp. 1028, 1040-43 (D.N.D. 1986) (agreement by competing hospitals to deny the Indian Health Service a contractual price discount); *COMPACT v. Metropolitan Government*, 594 F. Supp. 1567, 1572-73 (M.D. Tenn. 1984) (agreement among black architectural firms to negotiate jointly on public projects); *Osborn v. Pennsylvania-Delaware Service Station Dealers Ass'n*, 497 F. Supp. 555, 557-58 (D.Del. 1980) (agreement among gasoline dealers to cease all sales to customers until maximum retail price of gasoline is increased); *In re Michigan State Medical Soc.*, 101 F.T.C. 191, 296-301 (1983) (agreement among competing doctors to increase state Medicaid reimbursement rates by threatening collective departicipation). *But see Crown Central Petroleum Corp. v. Waldman*, 486 F. Supp. 759 (M.D. Pa. 1980) (boycott by gasoline retailers aimed at increasing maximum retail prices was exempt from the antitrust laws under *Noerr*). *See also Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980) (Sherman Act is not applicable to a convention boycott by the National Organization for Women against all states that had not ratified the Equal Rights Amendment).

about the overbreadth of petitioners' interpretation was resolved by the Supreme Court's recent decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988). *Allied Tube* addressed the antitrust immunity available to competitors who agree to exclude a

rival from the market by using the standard-setting process of a private organization, there the National Fire Protection Association.[24] In the course of evaluating the respondent's claim to *Noerr* immunity, however, the Court set forth a general approach for determining whether collective conduct falls within the reach of *Noerr*.

"The scope of [*Noerr*'s] protection," the Court wrote, "depends . . . on the source, context, and nature of the anticompetitive restraint at issue." *Id.* at 1936. First, concerning the source of the restraint, a court must consider whether it is the result of valid governmental or private action. If the former, "those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Id.* If the latter, the restraint is immune from antitrust liability only if it is " 'incidental' to a valid effort to influence governmental action." *Id.* at 1940 (quoting *Noerr*, 365 U.S. at 143). The Court repeatedly stressed that not all efforts to secure government action merit protection under *Noerr*; instead, "[t]he validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity." *Id.* at 1936; *see also id.* at 1939. These two factors—context and nature—de-

[24] Allied Tube, the nation's largest producer of steel conduit for electrical wires, conspired with other interested parties to exclude the plastic conduit manufactured by its competitor, Indian Head, from the electrical conduit market. To this end, Allied Tube "packed" the 1980 annual meeting of the National Fire Protection Association with 155 new members whose only function was to vote against a proposal to include plastic conduit as an approved type of electrical conduit in the Association's 1981 National Electric Code. The plan was successful and Indian Head's product was excluded entirely in a substantial number of jurisdictions that adopted the National Electric Code directly into law. Recovery was based on the sales that Indian Head lost where its product could lawfully be used but was not used because of the stigma of not obtaining Code approval.

termine whether the conduct at issue is more appropriately characterized as "political activity with a commercial impact," immune from antitrust liability under *Noerr*, or as "commercial activity with a political impact," which must be evaluated "under the standards of conduct set forth in the antitrust laws." *Id.* at 1941, 1942.

Here, as in *Allied Tube*, the restraint as issue, *i.e.*, the boycott, plainly resulted from private, rather than governmental, action. Thus, the conduct is immune under *Noerr* only if it was a valid effort to influence governmental action,[25] which turns on whether it was primarily "commercial" or "political" in nature.

Unlike *Allied Tube*, the relevant conduct here did take place in a political context—the legislative arena—which weighs in favor of petitioners' claim to *Noerr* immunity for their boycott. *See id.* at 1936-37, 1939; *see also id.* at 1941 n.11. The nature of the activity, however, counsels strongly against *Noerr* immunity. Concerted refusals to deal by competitors cannot be regarded as "activity that

[25] *Allied Tube* suggests that for *Noerr* to apply, the restraint must also be "incidental" to the effort to influence governmental action. This requirement is aimed at situations, as in both *Noerr* and *Allied Tube*, where efforts to influence the government cause "direct" harm to competitors in the marketplace in addition to any harm resulting from governmental action. *See supra* at 38, 41 n.24. In such cases, the court must ensure that the defendants' efforts to influence legislative action are not a "mere sham" to cover what is actually an attempt to interfere directly with a competitor's business relationships. In this case, however, the boycott was aimed solely at the government as a purchaser of goods and services, and there is no allegation that the boycott caused the District any marketplace harm that is distinguishable from the harm caused by petitioners' efforts to induce the District government to raise their compensation. It therefore makes little sense to ask whether the boycott is "incidental" to the defendant's efforts to influence the government. Instead, the relevant question is simply whether it is a "valid" effort to influence government action.

has traditionally been regulated with extreme caution," *id.* at 1940 (citing *Noerr*, 365 U.S. at 141), or as "activity that 'bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act.'" *Id.* (quoting *Noerr*, 365 U.S. at 136). Moreover, SCTLA did not "confine itself to efforts to persuade"; instead, it "organized and orchestrated" a concerted effort to restrict the supply of services in the marketplace. *See id.*

Although the boycott thus seems to have been commercial in nature, petitioners, citing to the Supreme Court's decision in *NAACP v. Claiborne Hardward Co.*, 458 U.S. 886 (1982), nonetheless maintain that it was indeed "political activity" (variously referred to as "political petitioning," "efforts to mobilize political pressure," and even as "political theatre").[26]

In *Claiborne Hardware*, the Court reversed a state tort judgment against the National Association for the Advancement of Colored People and a large number of individuals who had participated in a boycott of white merchants in Claiborne County, Mississippi, from 1966 to 1972. The boycott was aimed at achieving a score of

[26] The possibility that boycotts organized for "political" purposes may be expressive conduct protected from regulation under the Sherman Act has generated intense interest among commentators. The relevant literature includes Hurwitz, *Abuse of Governmental Processes, the First Amendment and the Boundaries of Noerr*, 74 Geo. L.J. 65, 111-16 (1985); Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment*, 55 S. Cal. L. Rev. 983 (1982); Note, *A Market Power Test for Non-Commercial Boycotts*, 93 Yale L.J. 523 (1984); Note, NOW *or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 Colum. L. Rev. 1317 (1980); Comment, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131 (1980); Note, *Political Boycott Activity and the First Amendment*, 91 Harv. L. Rev. 659 (1978); *see also* Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 Duke L.J. 247; Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Nw. U.L. Rev. 705 (1962).

specific "Demands for Racial Justice," including such basic claims on the state as the desegregation of public schools and facilities, selection of blacks for jury duty, and the hiring of black policemen, as well as an afterthought demand for the employment of blacks as clerks and cashiers in all local stores. *Id.* at 899-900. The Court concluded that the meetings, speeches, and nonviolent picketing used to support the boycott were "political expression" that is "ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* at 907-08. The Court then considered whether the "strong governmental interest in certain forms of economic regulation," including regulation of business entities who associate "to suppress competition," justified an intrusion on ordinarily protected activity. *Id.* at 911-12. Distinguishing between political and economic activity, and acknowledging the state's broad power to regulate the latter, the Court discussed *Noerr* at some length, noting both the similarities and differences between the facts before it and the facts in *Noerr*:

> It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners clearly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of the petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.

Id. at 914. Because there was "'no suggestion that the [participants in the Claiborne boycott] were in competition with the white businesses or that the boycott arose

from parochial economic interests,'" the Court held that the nonviolent elements of the boycott were entitled to the protection of the First Amendment. *Id.* at 915 (quoting and approving the words of Judge Ainsworth in *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979), an earlier phase of the litigation over the Claiborne boycott).

Petitioners read *Claiborne Hardware* as holding that boycotts aimed at influencing the political process are "First Amendment activity" that is not covered by the antitrust laws.[27] As clearly reflected in the intended quotation above, however, the determination in *Claiborne Hardware* that the boycott was "political activity" was not based simply on the broad ground that the blacks sought by their boycott "to influence government action." Instead, as the Supreme Court reemphasized in *Allied Tube, Claiborne Hardware* rests on the findings that

> the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market.

100 S. Ct. at 1941; *see also Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).[28]

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[27] In considering the impact of *Claiborne Hardware* on the petitioners' *Noerr* defense, we note, as a preliminary matter, that while *Claiborne Hardware* involved the state law tort of malicious interference with a business, nothing in the Court's opinion suggests that it would apply any different analysis to conduct that allegedly violates the federal antitrust laws. To the contrary, *Claiborne Hardware's* discussion of *Noer-* suggests that the Court believed its analysis would be equally applicable in Sherman Act context.

[28] It is clear that not even politically motivated boycotts enjoy First Amendment protection against sanctions under all

Claiborne Hardware thus makes the motivation for the SCTLA boycott a crucial factor in determining whether it constituted protected "political" activity. Before the Commission, petitioners argued that their boycott was undertaken in order "to obtain more effective counsel for indigent defendants in furtherance of their Sixth Amendment rights." 107 F.T.C. at 584. The Commission disagreed; it found that "the boycott of the CJA program was undertaken to improve the economic well-being of the participants as competitors in the market for CJA services." *Id.* at 582. While petitioners' briefs in this court do not specifically challenge this finding, their argument implicitly contradicts it, which is sufficient, in this First Amendment context, to initiate our review of the finding.

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circumstances. In *International Longshoremen's Ass'n v. Allied Inter., Inc.*, 456 U.S. 212 (1982) (*ILA*), a case decided less than three months before *Claiborne Hardware*, the Court rejected, in a brief paragraph, the claim that a politically motivated secondary boycott by a labor union was entitled to First Amendment protection. Longshoremen had refused to handle cargoes arriving from or destined for the Soviet Union in order to protest the invasion of Afghanistan. The Court stated it has

> consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) [of the National Labor Relations Act] is protected activity under the First Amendment. (Citations omitted.) It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment.

456 U.S. at 226. The Court also noted that "[t]here are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others." *Id.* at 227.

In *Claiborne Hardware* the Court referred to *ILA* for the proposition that economic regulation in furtherance of an important or substantial government interest is not unconstitutional merely because it has an incidental effect on First Amendment freedoms. *See* 458 U.S. at 912.

Distinguishing between political and economic motives is a daunting task, even for a reviewing court which is asking only whether the characterization affixed by the finder of fact is supportable in the record. The inherent difficulty of determining another's subjective motivation is compounded where the actor's motives may understandably be mixed. Nonetheless, the objective circumstances surrounding the conduct give important clues as to the primary motive behind it, which in this case was clearly enough more economic than not.

The SCTLA boycott was organized by competitors for the immediate purpose of increasing the price they were paid for their services. The claim that the boycott was (at least ultimately) motivated in any important way by a "political" concern—the quality of representation available to the indigent accused—should be treated with skepticism in light of the more obvious economic benefit to the participants.[29] Moreover, the contemporaneous record confirms that any political motive for the strike was distinctly secondary to the economic one; the SCTLA petition announcing the boycott, for example, asserted simply that "unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act." No reference

[29] In fact, most commentators who have discussed an exemption from the Sherman Act for "non-commercial" or "political" boycotts have excluded from the scope of their analysis all boycotts organized by business competitors aimed at increasing their own profits. *See* Note, NOW *or Never: Is there Antitrust Liability for Noncommercial Boycotts?*, 80 Colum. L. Rev. 1317, 1319 & n.16 (1980); Comment, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131, 1133 (1980); Note, *Political Boycott Activity and the First Amendment*, 91 Harv. L. Rev. 659, 660 (1978); *see also* Kennedy, *Political Boycotts, The Sherman Act, and the First Amendment*, 55 S. Cal. L. Rev. 983, 990 (1982) ("One important factor in properly characterizing a particular mixed-motive boycott is the presence or absence of economic gain flowing to the boycotters.").

was made to the plight of their clients. A "press kit" prepared by SCTLA during the strike does include a statement arguing that the current rates are inconsistent with effective representation, but the dominant theme of these materials (the statement, a brochure from the Family Division Trial Lawyers Association, and several newspaper articles) is the trial lawyers' perception that they were underpaid. Nor were the boycotters much concerned with getting an increase in the per case ceiling, which would seem to be more directly related to the quality of the representation their clients received than the hourly rate. We also note that the sole issue raised by the boycott participants was compensation under the CJA; had the boycott been motivated primarily by concern with the quality of representation, the record would in all likelihood contain at least some other suggestions about how SCTLA thought that representation of indigent defendants could be improved.

Thus, without questioning the sincerity of the SCTLA members (and other knowledgeable but less interested witnesses) who testified about their concern for the quality of representation under the existing rates, we affirm the FTC's finding that the boycott was motivated primarily by economic self-interest. We recognize that a group boycott aimed at influencing the government may be motivated both by selfish and by selfless concerns, and that the two may be united even in a single participant. Accommodating the government's interest in regulating harmful economic activity to the right of its citizens to engage in joint political action requires us to determine which motivation predominates. As *Claiborne Hardware* illustrates, a boycott aimed at securing the civil rights of a minority does not lose its essentially "political" character merely because one of its goals—jobs in local stores—could improve the economic situation of some of

the participants.[30] Similarly, a boycott organized by competitors in order to increase the price they get paid for their services does not lose its "economic" character solely because the service is purchased by the government and the quality of that service is (or perhaps more accurately, should be) a matter of public concern. *See Allied Tube*, 108 S. Ct. at 1938.

The economic motivation for the boycott leads us to conclude that it is most appropriately described as "commercial activity with a political impact." Accordingly, we reject petitioners' position that all non-violent boycotts aimed at influencing the legislative process are immune from the antitrust laws. It is neither required nor supported by the relevant decisions of the Supreme Court. Indeed, dicta in *Allied Tube* strongly suggests that *Noerr* does not extend to restraints indistinguishable from the one before us:

> We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 43, 456-463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia v. Evans*, 316 U.S. 159 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action. Immunity might even be claimed for anticompetitive mergers on the theory that they give the merging corporations added political clout.

[30] Even this goal, which could be characterized as "economic" when viewed in isolation, is more appropriately viewed as part of a comprehensive effort to achieve racial equality in the public life of Claiborne County. By contrast, as noted above, SCTLA's demand for increased CJA fees was not part of a larger effort to focus attention on the quality of representation provided to indigent defendants or on the criminal justice system in the District of Columbia.

108 S. Ct. at 1938-39 (parallel citations omitted); *see also id.* at 1941 n.10.

As this passage indicates, the anticompetitive implications of the petitioners' proposed extension of *Noerr* are far-reaching. More than one-fifth of the gross national product is purchased by government entities with money derived from legislative appropriations;[31] immunizing all non-violent boycotts aimed at affecting the legislative process would free the businesses that must now compete to supply this tremendous demand instead to "lobby" for increases in the prices they receive by collectively withholding production. Petitioners' suggestion that immunity be limited to those boycotts "designed to dramatize public issues" would offer little relief. The protectionist arguments that national security depends upon a domestic supply of boots and foodstuffs and everything else an army uses illustrates that virtually any industry could invoke an issue—perhaps its own welfare—that is, as petitioners' would require, "of interest to a broader group than the boycotters themselves." This is the stuff of which economic chaos is made in countries that tolerate coercive political action by industry, and from which the Sherman Act has shielded this country for almost a century.

V.

Our conclusion that such economic boycotts are not categorically immune from the antitrust laws, however,

[31] *See* U.S. Bureau of the Census, Statistical Abstract of the United States: 1988 at 410 (108th ed. 1987).

does not conclusively resolve the petitioners' claim that their specific boycott is entitled to First Amendment protection. While the state may legitimately regulate economic boycotts, the scope of its regulation must be limited lest the incidental restriction of the participants' First Amendment freedoms be greater than is essential to further the state's interest in maintaining competition. This First Amendment limitation on economic regulation, which was acknowledged in *Claiborne Hardware*, 458 U.S. at 912, derives from the Supreme Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1968). That case concerned the government's authority to regulate expressive conduct in the context of a criminal prosecution for burning a draft card, but the Court laid down standards of far greater generality. The Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," only a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376.

We think it clear that the SCTLA boycott did contain an element of expression warranting First Amendment protection.[32] We base this holding on "the nature of the appellant[s'] activity, combined with the factual context and environment in which it was undertaken." *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (per curiam) (the display of a United States flag with a peace symbol attached to it is a form of protected expression). As for the "nature of the activity," we note that boycotts have historically been used as a dramatic means of communicating anger or disapproval and of mobilizing sympathy for the boycotters' cause. *See Costello Publishing Co. v.*

[32] The Commission did not address this question because it found that the policies underlying the federal antitrust laws (including the *per se* condemnation of price fixing boycotts) justified any incidental restriction on the petitioners' First Amendment freedoms. *See* 107 F.T.C. at 594-95.

Rotelle, 670 F.2d 1035, 1050 (D.C. Cir. 1981) (boycotts are "a staple of political, as well as economic, activity"). Moreover, the "factual context" of the SCTLA boycott suggests that the participants intended to communicate a message regarding the prevailing CJA rates and that this message was understood by others. Petitioners actively courted media coverage of their "strike" by handing out press kits and organizing picket lines and rallies. *See supra* at 9. The media responded with a number of newspaper articles and television stories that not only reported the boycott but also served to publicize the petitioners' claims that the prevailing CJA rates were inadequate.

Given that the First Amendment is implicated by aspects of the boycott, *O'Brien* provides that:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3] if the government's interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. Application of the first three parts of the *O'Brien* test poses few problems. No one seriously doubts that [1] antitrust laws lie within the constitutional power of Congress to regulate commerce, nor that [2] the government's interest in prohibiting restraints on competition is "important or substantial." *See United States v. Topco Associates*, 405 U.S. 596, 610 (1972) ("[The antitrust laws] are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."). Petitioners have not suggested that this interest is in any way "related to" the suppression of free expression, or even that the Commission's decision to bring this case was inspired by hostility

to the content of the boycotters' speech about the inadequacy of the CJA rates.

In this context, however, *O'Brien* also requires that the restriction on expression be "no greater than is essential" to further the government's interest in protecting competition. The Commission argues that it has satisfied this part of the *O'Brien* test because it has left SCTLA and the other petitioners free to continue speaking out collectively for legislative change, and prohibited only their agreeing collectively to surrender their trade freedom—*i.e.*, to renew the boycott. But since the boycott had an expressive side to it, this is a restraint on speech that can stand, per *O'Brien*, only if the Commission can show that it is essential in order to vindicate the policies of the antitrust laws.

In this regard, SCTLA challenges the Commission's failure to determine that the boycott participants had "market power," that is, the ability profitably to raise price. The market power requirement generally serves to ensure that the antitrust laws do not interfere with business arrangements that could not actually exert any detrimental effect on competition. The Commission did not inquire into SCTLA's market power insofar as it proceeded on a theory of *per se* illegality, of course, because the chief reason for the *per se* rule is to condemn price-fixing and kindred agreements among competitors without having to make potentially time-consuming and difficult factual determinations. *See Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). On the *per se* illegality of price fixing agreements, see *supra* at 22-25; *see also FTC v. Indiana Fed'n of Dentists*, 106 S. Ct. 2009, 2018 (1986); *Socony-Vacuum Oil*, 310 U.S. at 224 n.59 ("[A] conspiracy to fix prices violates § 1 of the Act though it is not established that the conspirators had the means available for accomplishment of their objective . . . ."). Nor did the Commission look for market power when it analyzed the SCTLA boycott under the

Rule of Reason; under that approach it was not necessary for it to proceed any further once it determined that there were no countervailing procompetitive justifications for the facially anticompetitive boycott.

The antitrust laws permit, but do not require, the condemnation of price fixing without proof of market power; even the *per se* rule, as the Commission acknowledges in its brief, is only a rule of "administrative convenience and efficiency," not a statutory command. FTC Brief at 39; *see Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 n.25 (1984). While the rule may occasionally be overinclusive, condemning the ineffectual with the harmful, there is no known danger that socially benefical arrangements will be prohibited, for price-fixing agreements rarely, if ever, have redeeming virtues. As for the hapless but harmless, as Professor Areeda has noted, defendants charged with conspiring to fix prices "have little moral standing to demand proof of power or effect when the most they can say for themselves is that they tried to harm the public but were mistaken in their ability to do so." VII P. AREEDA, ANTITRUST LAW ¶ 1509 at 411 (1986).

When the government seeks to regulate an economic boycott with an expressive component, however, its condemnation without proof that the boycott could in fact be antitcompetitive ignores the command of *O'Brien* that restrictions on activity protected by the First Amendment be *"no greater than is essential"* to preserve competition from the sclerotic effects of combination. *See also NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect."). The Commission suggests that we misread *O'Brien*, noting that the Court in that case upheld the government's restraint on the defendant's ability to express himself by burning his draft card, because draft cards are a "legitimate and substantial administrative aid in the functioning of [the registration] system." 391

U.S. at 377. Similarly, the government urges here, condemnation *per se*, without regard to market power, is a legitimate and substantial aid in the administration of the antitrust laws. True enough, and we do not say that administrative convenience may never justify an incidental restriction on expressive conduct; *O'Brien* is to the contrary in the context of Congress's effort to raise and maintain an army during a period of international conflict. We hold only that the evidentiary shortcut to antitrust condemnation without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate. *See In re Primus*, 436 U.S. 412, 434 (1978) ("Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs.").

The Commission also argues that requiring a showing of market power in this case will effectively do away with *per se* analysis altogether, as if, in the somewhat hysterical terms argued to us, "price-fixing is to be deemed 'speech' merely because the price-fixers claim they must engage in such conduct in order to communicate effectively with their target . . . ." This prophecy greatly overestimates the reach of our decision, as we suspect, from its placement in a footnote to its brief, the Commission fully understands. First, our determination that the SCTLA boycott contained an element of protected expression is not based simply on the petitioners' claim that they needed to engage in the boycott in order to communicate effectively; instead, it is based on the "factual context and environment" in which the boycott was undertaken, including the petitioners' active efforts to appeal to the public for support of their demand for a raise. In this regard, their boycott was like the "strike" they called it. Second, as noted above, our evaluation of the petitioners' conduct is not unaffected by the special concern

of the First Amendment with efforts to petition the government for redress of one's grievances. Where the measure of this constitutional right is at stake, it is not too much of a burden on the government to require that it prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns. This latter consideration obviously would not apply to a boycott directed against private participants in the market.

VI.

Had the boycott participants market power? The Commission says they did, although it has never defined the relevant market or estimated the petitioners' share of it. Indeed, both petitioners and respondent suggest that the market power issue should be resolved in their favor on the basis of the existing record.

SCTLA's arguments warrant only a brief comment. It suggests that the dramatic increase in the number of lawyers volunteering to take CJA cases following the rate increase demonstrates that the boycotters had only very short-run market power, if they had any at all. The availability of alternative suppliers who will quickly substitute into a market or increase existing production in response to a small price increase is, of course, highly relevant to the question of market power. Suppliers that will so respond should be included in the definition of the market.[33] Other suppliers, that will respond only to a larger increase in price or that may take longer to enter, may nonetheless pose an important restraining effect on the exercise of power by market incumbents, and may

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[33] Both the magnitude of the price increase considered and the length of time allowed for new entry may vary depending on the reason the market is being defined. In the context of mergers, for example, the Department of Justice generally defines markets by examining the effect of a five percent price increase lasting one year. *See* U.S. Department of Justice, Merger Guidelines §§ 2.11, 2.2 (1984).

also therefore be relevant in assessing the meaning of market shares. The facts concerning such new entry as occurred in the wake of the CJA increase are far from clear in the record before us, however, and they should in any event be evaluated in the first instance by the Commission.[34]

SCTLA also notes that the District had the option of persuading or forcing other attorneys to replace them. There are obvious drawbacks, however, to the government's use of its power to coerce certain citizens to provide their services to others. In fact, when CJA funds ran out in 1974, an attempt to conscript attorneys to represent indigent defendants encountered strenuous resistance. In any event, a group that engages in a supply disrupting boycott against the government should not ordinarily be permitted to defend against an antitrust suit on the ground that the government failed to use its extraordinary powers to relieve the economic pressure they had brought against it.

Without conceding the need to demonstrate market power, the Commission argues that its findings regarding the effect of the boycott are sufficient to show that petitioners had market power. The Commission's argument is

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[34] Contrary to SCTLA's suggestion, the record admits of starkly contrasting inferences. We note, for example, that the CJA attorneys received a rate increase of 75% for out-of-court time and of 17% for in-court time, substantially above the 5% increase generally used by the Department of Justice in defining markets under the merger guidelines. *See supra* n.33. In addition, the assumption that production substitution serves as a check on market power may be problematic when the price is set through legislation. As petitioners have repeatedly noted, legislatively determined prices tend to be "sticky" so that an increase in supply caused by a rise in price is unlikely to restore the market to the competitive equilibrium, *i.e.*, to a lower price. Thus, post-increase entry may only reflect the availability of supra-competitive returns for new entrants, resulting in rationing of cases to lawyers.

based on *FTC v. Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986), where the Supreme Court held that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* at 2019 (quoting P. AREEDA, ANTITRUST LAW ¶ 1511 at 429 (1986).

The "actual detrimental effects" cited by the Commission include its findings that the SCTLA boycott "dramatically reduced the supply of lawyers to the city's CJA program"; "adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants"; and "forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [petitioners]." 107 F.T.C. at 577. We agree that in the typical commercial context, these findings would generally be more than sufficient support for the conclusion that an arrangement had an actual detrimental effect on competition. The normal assumptions regarding cause and effect in an economic market cannot be transplanted wholesale into the political arena, however. There are reasons to pause before inferring market power from detrimental effects when political power may be the more explanatory variable.

Power of some sort was surely exercised: The city council approved a CJA rate increase it had long refused, two weeks into a boycott that disrupted the court system and generated significant publicity. Perhaps the rate increase would have followed just as swiftly if the boycotters had simply stopped accepting appointments, exerting their raw market power under a shroud of conspiratorial silence. But it is also possible that, lacking any market power, petitioners procured a rate increase by

changing public attitudes through the publicity attending the boycott. The boycott may have engendered significant public pressure; the ALJ found it did not, but the Commission did not reach the question and rejected the ALJ's findings except insofar as it expressly adopted them. *See* I.D.F. 58; 107 F.T.C. at 563 n.4. Or the publicity surrounding the boycott may have served only to dissipate any public opposition that a substantial raise for lawyers who represent indigent defendants had previously encountered.[35]

Even if one were to conclude that the city increased the rates solely as a response to the decrease in supply of attorneys willing to accept CJA appointments, it still would not follow without more that the petitioners had market power. The reduced supply of lawyers to take CJA cases would reflect an economic distinction between

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[35] The record demonstrates that Mayor Barry and other important city officials were sympathetic to the boycotters' goals and may even have been supportive of the boycott itself. *See* I.D.F. 37, 38, 43, 45, 50, 63; 107 F.T.C. at 560. At a meeting on August 29, 1983, for example, Mayor Barry, who was aware of the September 6 strike deadline, explained the District's emergency legislative process to SCTLA representatives and told them "[y]ou do what you have to do, and i will do what I have to do." *See* I.D.F. 50. Indeed, the ALJ concluded that "the Mayor . . . believed that an increase was fully merited but could not be brought about unless the city was confronted with an actual emergency demonstrating the importance of the CJA lawyers to the administration of the criminal justice system." 107 F.T.C. at 559. We agree with the Commission that the Mayor's "knowing wink" cannot confer immunity on the petitioners if they did, in fact, have market power that they exercised to the detriment of the city. *See Socony Vacuum Oil*, 310 U.S. at 226. Nonetheless, the mayor's remarks could also be interpreted as encouraging the petitioners to stage a demonstration of their political muscle so that a rate increase could more easily be justified to the public. Such a demonstration would not offend the antitrust laws if the petitioners actually lacked the ability to exert any significant economic pressure on the city.

the CJA market and the other markets for lawyers' services, which would support the market power hypothesis, or it could instead reflect the success of SCTLA's persuasive campaign among other lawyers who were in the same market but were also in political sympathy with them. The ALJ specifically found that the "feeble" response of the "uptown" lawyers to the PDS's call for help was due, in part, to "their underlying support for the demands of the CJA lawyers." I.D.F. 60. Again, however, the Commission did not pass upon the point, and did not adopt the relevant finding.

Given such inherent difficulties in inferring market power from the "effects" of the petitioners' boycott, the Commission may need to examine structural evidence to determine the degree of market power, if any, that petitioner wielded. This will require that the Commission define a relevant "market" that includes all services that are effective substitutes for the petitioners' services and are likely to be available within a reasonable time. The significance of petitioners' share of the market thus defined can then be assessed in light of other factors relevant to the exercise of market power.

The form that its "market power" inquiry should take on remand is an issue that is best left to the Commission's expert judgment. In particular, we do not mean to suggest that the exhaustive and time consuming market definition exercise that is endemic to merger litigation is necessary or desirable in this context; if the Commission has a better approach, it should use it. Nor are we unaware of the irony of our remitting the Commission to evidence of market structure in a case where it can point to evidence of actual effects from the boycott. Structural evidence is indirect and thus inferior to direct evidence of market power, but it is the best available evidence in most cases affecting market structure, such as merger cases. In cases involving allegedly anticompetitive con-

duct on the other hand, the Commission would not normally concern itself with issues of market definition, market share, and the inferences to be drawn therefrom. As we have seen, however, on the peculiar facts of this case, which are unlike those in *Indiana Federation of Dentists*, "proof of actual detrimental effects, such as reduction of output," cannot "obviate the need for an inquiry into market power," unless the court can with confidence reject the possibility that the effects were the product simply of the rough and tumble of municipal politics. If the FTC can make that showing, of course, then it need not rely on structural market evidence after all.

If the Commission determines that petitioners have significant market power, it will need to determine also how much market power is sufficient to justify the condemnation of an expressive boycott. This is apparently a matter of first impression. Clearly, the First Amendment concerns implicated by expressive boycotts require that they not be condemned if their ability to harm competition is insignificant. Only an expressive boycott that poses a significant threat to competition warrants condemnation under the antitrust laws, as an "unreasonable restraint of trade."

We recognize, of course, that even proof that the petitioners have significant market power does not conclusively demonstrate that their boycott succeeded because it was coercive rather than persuasive. Balanced against petitioners' First Amendment rights to speak and to petition the government, however, is the need to protect that government, as a purchaser, from the economic pressure of suppliers acting in concert. The approach we have outlined today is intended to afford government the protection of the Sherman Act without infringing to any avoidable degree upon the First Amendment rights of those whose petition for redress goes beyond pure speech to take the form of a boycott.

VII.

We therefore vacate the order entered by the Commission and remand the case for further proceedings consistent with this opinion. In view of this disposition, we need not now consider the petitioners' contention that the Commission's order is overly broad and not reasonably related to the remedial purposes of the Act. Accordingly, the petition for review is granted in part and denied in part.

So ordered.

SILBERMAN, *Circuit Judge, concurring*: I concur fully in the court's comprehensive opinion, except for its reliance on the Trial Lawyer's commercial motivation. I think it fair to say that, at a minimum, their motivation was mixed, and I do not think it necessary or desirable in this case to determine which of the two impulses predominates. Rather, it is my view that the Supreme Court's cases hold that certain techniques traditionally proscribed may themselves be used to characterize conduct as commercial rather than political regardless of the actor's motivation, and that the FTC's task is to determine whether such a technique has been employed.

I agree with the majority that observing that SCTLA set out to influence governmental activity hardly completes the analysis. A supplier to government that uses its market power to influence the government to pay a higher price for goods could have no claim to antitrust immunity. *See* Maj. op. at [50-51]; I P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 206 (1978). On the other hand, members of an industry that engaged in a successful letter writing campaign to influence government to pass legislation effectively increasing their profit margins would have taken part in protected political activity. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The difficulty in this case, where petitioners directed at government a boycott —which could be either expressive or coercive—is determining whether they in fact prevailed because of political appeal or commercial might.

I do not believe the answer lies in the majority's analysis of petitioners' subjective motivation, nor that the Supreme Court's cases compel that sort of examination. *Allied Tube* does draw a distinction between commercial activity with political impact and political activity with commercial impact. 108 S. Ct. at 1941. The majority at [48-50], however, appears to equate political activity with altruism, requiring that petitioners have the Sixth

Amendment interests of their clients primarily in mind if they are successfully to claim they are engaging in political speech. The setting of reimbursement levels for publicly appointed defense counsel is a political issue, though, and petitioners' self-interest does not strip their speech of its political character. The activity held to be protected in *Noerr* was designed to harm truckers and help the railroads. 365 U.S. at 142-44; *see also United Mine Workers v. Pennington*, 381 U.S. 657, 667-70 (1965). Similarly, the Court in *Allied Tube* acknowledged that lobbying to remove the "competitive threat" of polyvinyl chloride conduit could be protected, 108 S. Ct. at 1942, and even the boycotters in *Claiborne Hardware*, from which the majority draws the motivation test, were obviously seeking legislation beneficial to them. *See* 458 U.S. at 899, 935 (app.).

The difficulty with the motivation test as the majority uses it is sharply illustrated by comparing *Claiborne Hardware* with *International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212 (1982) ("*ILA*"). Both cases involved boycotts of private commercial enterprises in order to bring political pressure—the longshoremen were protesting the Soviet invasion of Afghanistan while the boycotters in *Claiborne Hardware* sought to vindicate certain Fourteenth Amendment rights. Yet the *Claiborne Hardware* boycott's nonviolent elements were held to be protected by the First Amendment, while the longshoremen's First Amendment claims were dismissed in a brief paragraph, *id.* at 226-27, despite the apparent acceptance by the Court of the purely political motivation of the boycott, *see id.* at 222-26. Motivation then, in the sense of the absence of desire for personal enrichment, cannot be the determinant of what speech is protected as political. If it were—since we all act with some attention to our economic interests—*Noerr* immunity could seldom be invoked.

To be sure, *Claiborne Hardware* emphasized that the boycotters' purpose was to "influence government action,"

458 U.S. at 914, and in *Allied Tube* the Court, in referring to *Claiborne Hardware*, described the boycotters' motivation as lacking any "desire to lessen competition or to reap economic benefits," 108 S. Ct. at 1941. But I think it is more telling that the *Claiborne Hardware* Court distinguished *Noerr* because, unlike the railroads, the *Claiborne Hardware* boycotters, although injuring private parties, did not aim at destroying "legitimate competition," 458 U.S. at 914, and that in *Allied Tube* the Court observed "the boycotters were consumers who did not *stand* to profit financially from a lessening of competition in the boycotted market." 108 S. Ct. at 1941 (emphasis added). In other words, regardless of the boycotters' exact psychological motivation, they were not using a technique that is generally thought to work market injury, so the activity can be characterized as political.

I think the proper distinction between political and commercial activity must in cases such as this one—where the objective is the same (raising rates) regardless of the originating considerations—turn on the *means employed* in eliciting a governmental response. As I said at the outset, if one gets one's way from the government *qua* legislator because of political persuasiveness, there is no liability. But using market power to coerce the government *qua* economic actor creates a distortion of the market and the political process. Since a boycott has the potential either to persuade or to coerce, however, the only proxy we have for whether SCTLA relied on political or commercial power, the crucial element of the "context and nature," *Allied Tube*, 108 S. Ct. at 1942, of this case, is the degree of market power they enjoy. If they have none, the boycott must have succeeded out of persuasion and been a political activity. But if there is market power, one must assume, for antitrust purposes, it came into play and that the boycott was primarily commercial.

I think this approach offers a reconciliation of *Claiborne Hardware* and *ILA*, holdings which surely cannot be satisfactorily explained in terms of the Supreme Court's policy views of the political objectives advanced.[1] The *ILA* Court called that boycott "conduct designed not to communicate but to *coerce*." 456 U.S. at 226 (emphasis added). It appears the Court was troubled by the longshoremen's use of the traditionally prohibited secondary boycott, *see* 456 U.S. at 224, but not with the ability of the *Claiborne Hardware* petitioners actually to reduce competition in the market for groceries and reap that benefit. Similarly, the Court in *Allied Tube* emphasized that the standard-setting process there "involve[d] the exercise of market power." 108 S. Ct. at 1941. If the *Claiborne Hardware* boycotters had put forth the same demands but, rather than consumers, had been the only three suppliers of electricity to the government or to private users, I think it likely the Court would have focused its analysis more clearly on factors such as available alternative power sources—in short, the indicia of market power.

I therefore agree with the majority that the FTC must inquire into market power. A boycott *is* the sort of activity "normally held violative of the Sherman Act," *Noerr*, 365 U.S. at 136, but if it has a communicative element and is undertaken without market power, it cannot be a primarily commercial activity.

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[1] It is true that the *Claiborne Hardware* Court described the boycotters as seeking "to effectuate rights guaranteed by the Constitution itself," 458 U.S. at 914, and juxtaposed that objection against only the right of the states to regulate economic activity. This might suggest that the Court would give greater deference to federal regulation in drawing the appropriate balance with the First Amendment. Nevertheless, *Claiborne Hardware* does not appear to me to be limited to boycotts that protest unconstitutional practices.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1465

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

September Term, 1987

[FILED AUG. 26, 1988]

BEFORE: ROBINSON, SILBERMAN, and GINSBURG, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petition for review is granted in part and the case is remanded, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE, CLERK

Date: August 26, 1988
Opinion for the Court filed by Circuit Judge D.H. Ginsburg.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1465

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,

v.

FEDERAL TRADE COMMISSION, RESPONDENT

September Term, 1988

[FILED OCT. 25, 1988]

BEFORE: WALD*, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, Circuit Judges

ORDER

Respondent's Suggestion for Rehearing *En Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

*Chief Judge WALD did not participate in this order

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: DANIEL OLIVER, CHAIRMAN
PATRICIA P. BAILEY
TERRY CALVANI
MARY L. AZCUENAGA
ANDREW J. STRENIO, JR.

Docket No. 9171

IN THE MATTER OF

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
AN ASSOCIATION,
RALPH J. PERROTTA
KAREN E. KOSKOFF, AND
REGINALD G. ADDISON,

AS PRIVATE LAW PRACTITIONERS AND AS OFFICERS OR DIRECTORS OF SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, AND

JOANNE D. SLAIGHT, A PRIVATE LAW PRACTITIONER.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to grant the appeal and reverse the initial decision. Accordingly.

IT IS ORDERED, That the findings of fact and initial decision of the Administrative Law Judge be rejected except as specifically adopted in the findings of fact and conclusions of law contained in the accompanying opinion. The findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

IT IS FURTHER ORDERED, That the following order to cease and desist be, and the same hereby is, entered:

I.

IT IS ORDERED that respondent Superior Court Trial Lawyers Association, an association, its successors and assigns, and its officers, directors and members; Ralph J. Perrotta, individually and as a director of Superior Court Trial Lawyers Association; Karen E. Koskoff and Reginald G. Addison, individually and as officers of Superior Court Trial Lawyers Association; Joanne D. Slaight, individually; and respondents' agents or representatives, directly or through any device, in connection with their activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from entering into, continuing, cooperating in, or carrying out any agreement, understanding, or planned common course of action, either express or implied, to:

A. Refuse to provide legal services to any government program that provides legal services for persons eligible for appointed counsel in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for such legal services;

B. Interfere with the operation of the Superior Court of the District of Columbia or of any court or of any government agency in connection with any effort to

fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

C. Coerce any person not to provide or discourage any person from providing legal services in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

D. Encourage, suggest, advise, or induce respondent Superior Court Trial Lawyers Association, any member of Superior Court Trial Lawyers Association, or any other person to engage in any action prohibited by this Order;

Provided that nothing in this Order shall prevent respondents from:

(1) Exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules or procedures; or

(2) Providing information or views in a noncoercive manner to persons engaged in or responsible for the administration of any program to obtain legal services for persons eligible for appointed counsel.

II.

IT IS FURTHER ORDERED that respondent Superior Court Trial Lawyers Association shall:

A. Distribute by first-class mail a copy of this Order to each of its members, officers and directors within thirty (30) days after this Order becomes final;

B. Distribute by first-class mail a copy of this Order to each person who becomes a member, officer or director of Superior Court Trial Lawyers Association within thirty (30) days of such person's becoming a member,

officer or director, during each of the first three (3) years after this Order becomes final; and

C. Within thirty (30) days after the Order becomes final and for ninety (90) days thereafter, post a copy of this Order in each location in which notices of meetings of respondent Superior Court Trial Lawyers Association are customarily posted.

III.

IT IS FURTHER ORDERED that the respondents herein shall within sixty (60) days of service upon them of this Order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied and are complying with this Order, and shall file such other reports of compliance as the Commission may from time to time require.

IV.

IT IS FURTHER ORDERED that each of the individual respondents named herein shall, for a period of five years after this Order becomes final, promptly notify the Commission of the discontinuance of his or her present legal practice, business or employment and his or her affiliation with a new legal practice, business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the legal practice, business or employment in which the respondent is newly engaged. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

v.

IT IS FURTHER ORDERED that respondent Superior Court Trial Lawyers Association shall notify the Commission at least thirty (30) days before any proposed change in its form of organization that may affect compliance obligations arising out of this Order.

By the Commission, Chairman Oliver and Commissioner Strenio not participating.

SEAL

/s/ EMILY H. ROCK
Emily H. Rock
Secretary

ISSUED: JUNE 23, 1986

ATTACHMENT:
Opinion of the Commission

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: DANIEL OLIVER, CHAIRMAN
PATRICIA P. BAILEY
TERRY CALVANI
MARY L. AZCUENAGA
ANDREW J. STRENIO, JR.

Docket No. 9171

IN THE MATTER OF

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, AN ASSOCIATION,
RALPH J. PERROTTA
KAREN E. KOSKOFF, AND
REGINALD G. ADDISON,

AS PRIVATE LAW PRACTITIONERS AND AS OFFICER OR DIRECTORS OF SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, AND

JOANNE D. SLAIGHT, A PRIVATE LAW PRACTITIONER.

OPINION OF THE COMMISSION

By Azcuenaga, Commissioner:

In the summer of 1983, the District of Columbia Superior Court Trial Lawyers Association ("SCTLA"), its officers, members and other lawyers agreed to stop providing legal services to the District of Columbia for indigent criminal defendants, until the District increased the fees it paid for such services. In furtherance

of their agreement, the individual respondents and other SCTLA lawyers refused to accept new indigency cases beginning September 6, 1983, until the District raised the fees. On September 20, 1983, in order to resolve the crisis caused by the boycott in its program for the legal representation of indigents, the District government enacted emergency legislation to increase the fees it paid under the Criminal Justice Act ("CJA")[1] to lawyers who participated in the program.

The Commission issued a complaint alleging that the Superior Court Trial Lawyers Association, the three named officers of the association, and the chairperson of the SCTLA Strike Committee entered into an agreement to restrain trade by refusing to compete for or to accept new CJA appointments unless the fees were raised. The complaint alleges that this conduct constitutes a conspiracy to fix prices and to conduct a boycott in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

After a hearing, the Administrative Law Judge found that the Superior Court Trial Lawyers Association and the named respondents had engaged in a concerted refusal to deal for the purpose of increasing the CJA fees and that the boycott had the effect of increasing those fees. He also concluded that the boycott was not political action protected by the First Amendment from application of the antitrust laws. The Administrative Law Judge nevertheless dismissed the complaint on the ground that the boycott had no adverse effects, because an increase in the CJA fees was necessary to "satisfy the 'political' (*i.e., constitutional) requirement of effective*

[1] D.C. Code Ann. §§ 11-2601 to -2609 (1981).

representation"[2] and that the strike was the "only feasible way" to secure the increase.[3]

We affirm the Administrative Law Judge's conclusions that the respondents engaged in a concerted refusal to deal for the purpose of raising prices and that their boycott is not immune under the First Amendment from the antitrust laws.[4] We reverse the Administrative Law Judge's decision as to liability, and we conclude instead that the SCTLA lawyers' boycott was a *per se* violation of Section 5 of the Federal Trade Commission Act. Our conclusion would be the same under a rule of reason analysis.

THE FACTS

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." If the accused cannot afford counsel, then counsel must be appointed by the court.[5] In order to

[2] I.D., slip op. at 94. We use the following abbreviations in this opinion:

I.D. – Initial Decision
I.D.F. – Initial Decision Finding
R.A.B. – Respondents' Answering Brief
JX – Joint Exhibit
CX – Complaint Counsel's Exhibit

Testimony is cited by the name of the witness followed by the transcript page.

[3] I.D., slip op. at 96.

[4] The Commission's findings of fact and conclusions of law are stated in this opinion. The findings and conclusions of the Administrative Law Judge, except as specifically adopted herein, are rejected.

[5] *See, e.g.*, United States v. Cronic, 466 U.S. 648 (1984).

comply with the requirements of the Sixth Amendment to provide counsel for indigent criminal defendants, the District of Columbia provides a mixed system of private lawyers compensated under the Criminal Justice Act and government lawyers employed by the District's Public Defender Service ("PDS").[6]

By statute, the Public Defender Service may represent only indigent criminal defendants who are charged with an offense punishable by imprisonment for six months or more and may represent no more than 60 percent of the indigents in this category.[7] Private practitioners appointed and paid under the Criminal Justice Act provides most of the remaining balance of the representation of indigents.[8] PDS lawyers handle the more serious felony cases, and the CJA lawyers provide the larger volume of the District's criminal indigency representation.[9] In fiscal year 1982, CJA lawyers handled 19,475 of the 25,000 misdemeanor indigency cases closed that year and approximately 4,000 felony cases, usually those involving less serious felonies than those handled by the PDS lawyers.

Every member in good standing of the District bar who has a local address and telephone number and who registers with the CJA office of the Public Defender Service is eligible for assignment of cases under the CJA. Although more than 1,200 private attorneys are registered for CJA assignments, most appointments go

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[6] I.D.F. 15.

[7] I.D.F. 17.

[8] In addition, private attorneys working on a *pro bono* basis and third-year students from local law schools participating in clinical programs provide about 5% of the legal representation for indigent defendants. I.D.F. 20.

[9] I.D.F. 19.

to approximately 100 CJA "regulars," who derive almost all their income from representing indigents and make themselves available to take CJA appointments on a regular basis.[10]

Case assignments under the CJA are generally made on a rotation basis by a judge or commissioner, who assigns a CJA attorney from the daily list of those who have called in for CJA appointments to each eligible person listed on the daily lock-up list. The assigning commissioner or judge may depart from this rotation in order to assign a particularly complex case to a more experienced attorney, to limit a new attorney to misdemeanor cases, or to accommodate an attorney's request that he or she be assigned only to a particular type of case (*e.g.*, only felonies or only misdemeanors).[11] The most important case assignment criterion, however, is availability.[12]

In 1983, before the strike, the CJA fees paid by the District were set at $20 per hour for out-of-court time and $30 per hour for in-court time, with case maximums of $1,000 for felonies, $400 for misdemeanors and $1,000 for appeals.[13] Each lawyer was also limited to annual maximum earnings under the CJA program of

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[10] I.D.F. 18.

[11] I.D.F. 22 & 23.

[12] I.D.F. 24.

[13] I.D.F. 26. The District's Criminal Justice Act, D.C. Code Ann. § 11-2604(a), provided for compensation of CJA attorneys "at a rate . . . not to exceed the hourly scale established by" the federal statute for appointed counsel, 18 U.S.C. § 3006A(d). The District's preboycott fees were equal to the federal maximum. The 1983 amendment to the District's Criminal Justice Act provides for fees "not to exceed the rate of $35 per hour."

$42,000.[14] The amount of compensation actually paid to a CJA lawyer in each case is subject to the approval of the presiding judge, who has the authority to reduce the amount sought, although this is done in only a small percentage of cases. Occasionally, a lawyer may request compensation greater than the established per case limit on the ground that the particular case was extended or complex. Most of these requests are approved.[15]

The Superior Court Trial Lawyers Association is a loosely organized group of CJA-registered lawyers. Because lawyers are constantly entering and leaving CJA practice, the membership of the Association is difficult to determine precisely. Technically, membership and the right to vote in elections depend upon the payment of annual dues, but this requirement has not been enforced vigorously. In practice, virtually any lawyer who is registered for CJA assignments can participate in SCTLA meetings, vote in elections and even hold office in the organization.[16]

Despite its loose structure, the SCTLA was the "rallying point" for the CJA lawyers at the time of their strike.[17] The Association held informal meetings from time to time in the lawyers' lounge of the Superior Court, it had a board of directors and elected officers, and it maintained a bank account. At one time, the SCTLA organized a political action committee that collected funds and made contributions to political candidates who supported an increase in the level of fees

[14] I.D.F. 29; Carter Tr. 132. The annual ceiling was increased to $50,000 after the boycott.

[15] I.D.F. 27.

[16] I.D.F. 3.

[17] I.D.F. 2.

paid under the CJA. Officers of the SCTLA initiated a preboycott lobbying campaign to increase the CJA fees and paid the expenses of the campaign out of the SCTLA treasury. SCTLA officers organized the 1983 strike for higher fees, and the Association paid strike-related expenses. In general, SCTLA held itself out as the representative of CJA lawyers, and its officers were generally perceived to be authorized to speak on behalf of CJA lawyers regarding fee levels and other matters affecting CJA practice.[18]

The respondent Ralph J. Perrotta is a CJA regular, with about 90 per cent of this practice consisting of CJA cases. Mr. Perrotta was elected president of SCTLA in the fall of 1982 and chairman in October 1983.[19] The respondent Karen E. Koskoff, also a CJA regular, derived about 99 per cent of her practice from CJA assignments. In late 1982, Ms. Koskoff was elected vice-president of SCTLA and, in October 1983, she was elected SCTLA's president.[20] The respondent Reginald G. Addison, another CJA regular, derives about 90 per cent of his practice from CJA cases. In 1983, he was elected secretary of SCTLA and, in October 1983, he was elected SCTLA's vice-president.[21] During the period of time with which this action is concerned, the respondent Joanne D. Slaight was a CJA regular who derived 95 per cent of her practice from CJA cases. In August 1983, Ms. Slaight was named chairperson of the SCTLA "Strike Committee."[22] In December 1983, she

[18] I.D.F. 4.

[19] I.D.F. 5.

[20] I.D.F. 6.

[21] I.D.F. 7.

[22] I.D.F. 8.

left CJA practice for a position with a public interest research group in New York, but she has since returned to practice in the District and is again accepting cases under the CJA.[23]

Before the strike, the CJA lawyers, through the officers of SCTLA, engaged in a vigorous lobbying campaign for an increase of CJA fees.[24] This campaign, which was funded by the SCTLA treasury, included meetings with the Chief Judge of the Superior Court and the court's administrative officer to seek their support for a fee increase, with the Counsel to the Mayor to discuss legislative possibilities, with the Dean of the Howard University School of Law to seek advice on how to secure passage of legislation raising the CJA fees, and with a staff member of the Subcommittee on the District of Columbia of the Senate Committee on Appropriations to explore the possibility of federal funding to increase the CJA fees.[25] The SCTLA also rallied supporters to testify before the City Council's Committee on the Judiciary in favor of pending legislation to increase the CJA fees.[26] Despite the introduction of various legislative initiatives in the City Council, SCTLA did not succeed in its lobbying efforts to obtain passage of legislation raising the CJA fees.[27] City officials in the legislative and executive branches told the CJA lawyers that no money could be found to fund the increase.[28]

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[23] Supplemental Filing of Respondents, August 1, 1985.

[24] I.D.F. 37-45.

[25] I.D.F. 37-40 & 44.

[26] I.D.F. 42.

[27] I.D.F. 42 & 43.

[28] I.D.F. 36, 42, 43 & 45.

In early August 1983, the SCTLA leaders told the other CJA lawyers at an SCTLA meeting that the pending legislation to increase the CJA fees was unlikely to be passed because of the lack of funding. In response, the CJA lawyers voted to form a "strike committee," later designated the "SCTLA Strike Committee," to consider additional action to obtain a fee increase.[29] The members of the strike committee met shortly thereafter and agreed that the only way to obtain higher fees was for the CJA lawyers to stop accepting new CJA cases until the city complied with their demands. They also agreed that they should demand an increase to $45 per hour for out-of-court time and $55 per hour for in-court time.[30]

Ms. Slaight was designated chairperson of the strike committee, and Mr. Perrotta, Ms. Koskoff and Mr. Addision were designated as the "Negotiating Team." Other CJA lawyers were assigned responsibility for making sure that all the CJA lawyers knew about the strike, contacting other groups of lawyers and contacting the media.[31]

At an SCTLA meeting on August 11, 1983, a group of about 100 CJA lawyers agreed to strike if the CJA fees were not increased by September 6th.[32] Immediately

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[29] I.D.F. 46.

[30] Before the 1983 boycott, the District's CJA fees were set at the maximum, $20 and $30, provided in the federal Criminal Justice Act, 18 U.S.C § 3006A(d)(1)-(2). In October, 1984, one year after the boycott, the federal statute was amended to provide for fees "not exceeding" $60 per hour for in-court time and $40 per hour for out-of-court time.

[31] I.D.F. 47.

[32] I.D.F. 48.

following this meeting, a petition was drafted and posted in the lawyers' lounge. The petition stated:

> We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.[33]

The petition was signed by a number of CJA attorneys including Mr. Addision and Ms. Slaight.

By late August, the SCTLA lawyers were working to assure the success of the strike scheduled for September 6. The SCTLA (over Mr. Perrotta's signature) sent a letter to a number of law firms in the city announcing the impending strike to increase CJA fees and asking them to "support [SCTLA's] goals by not making your firm available to accept cases during this period."[34] The SCTLA Strike Committee solicited the written commitment of other CJA lawyers to support the boycott.[35] SCTLA members also addressed several lawyers' associations, making the same request, and made additional efforts to persuade the few remaining holdouts among the CJA lawyers to join in the strike.[36]

On August 29, immediately before a press conference scheduled by SCTLA to discuss the planned strike, SCTLA representatives met with Mayor Barry to discuss their demand for an increase in the CJA fees.[37] According to Mr. Perrotta, the Mayor was sympathetic

[33] CX 4B-D.

[34] CX 6A.

[35] CX 8A, CX 10A.

[36] I.D.F. 55.

[37] CX 13.

to the need for an increase in the CJA fees, but he did not know where the city would find the money to fund such an increase.[38] The Mayor explained the city's legislative and budgetary process to the SCTLA representatives and said that, except in an emergency, the process can take months.[39] The SCTLA representatives told the Mayor that the SCTLA lawyers had voted to strike beginning on September 6 if the CJA fees had not been increased by that time. The Mayor responded that even if he could find the money to fund an increase, he would be unable to do so by that date.[40]

On September 6, 1983, the strike began as planned. All of the named respondents and almost all of the CJA regulars stopped calling in to place their names on the daily list of attorneys willing to accept CJA appointments.[41] The SCTLA Strike Committee also staged a series of events – rallies, picket lines, handouts of "press kits," and newspaper and television interviews – designed to inform the general public about the goals of the strike.[42]

As anticipated by the SCTLA, the strike had a severe impact on the District's criminal justice system. The city's need for legal services for indigent criminal defendants continued during the strike and the available alternates to replace the CJA lawyers were inadequate to the need.[43] Within a few days, the Public Defender

[38] Perrotta Tr. 700; I.D.F. 50.

[39] Perrotta Tr. 701.

[40] *Id.*

[41] I.D.F. 56.

[42] I.D.F. 58.

[43] I.D.F. 60. Before the strike, 35 to 40 CJA lawyers called in daily for case assignments and handled about 85% of CJA cases. After September 6, only three or four CJA lawyers called in daily,

Service lawyers were swamped with cases. As many as eight of nine indigent defendants per day were assigned to PDS lawyers who already were carrying full caseloads. The few CJA regulars who continued to accept cases were also soon overloaded. The overall response of lawyers in private law firms to a call from the Public Defender Service for help was, in the words of the Administrative Law Judge, "feeble."[44]

On September 15, 1983, Messrs. Cohen and Carter of the Public Defender Service hand-delivered to Chief Judge Moultrie of the Superior Court, the Mayor, and City Councilwoman Wilhelmina Rolark a letter "to apprise [them] of the extremely serious situation that has now developed with respect to the legal representation of indigents in criminal and juvenile delinquency cases in the Superior Court of the District of Columbia" as a result of the strike by the SCTLA lawyers.[45] Messrs. Cohen and Carter stated that the PDS was unable to provide the necessary quantity and quality of legal services during the strike and that the daily demand for representation had "seriously depleted" the private bar as a resource for counsel for indigent defendants. The PDS urged Councilwoman Rolark, Chief Judge Moultrie and Mayor Barry to declare their support for pending

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and the percentage of indigency cases handled by them dropped to about 8%. I.D.F. 60 n.187.

[44] I.D.F. 60. The PDS requested volunteers from a list of 40 law firms with "conspicuous pro bono programs." The SCTLA Strike Committee, in late August, had requested these firms to support SCTLA by refusing to accept cases during the strike. *See* text at note 34 *supra*. It is unclear from the record whether the firms' lack of response to the PDS request for assistance resulted from the SCTLA letter. I.D.F. 55 n.169.

[45] CX 31A-C.

legislation to increase the CJA fees in order to alleviate the "crisis."[46] Chief Judge Moultrie also informed the Mayor that in his view the criminal justice system was approaching a crisis point.[47]

Immediately after receiving the letter from the Public Defender Service, the Mayor set up a meeting with the respondents Koskoff, Perrotta, and Addison. The purpose of the meeting was to negotiate an end to the SCTLA lawyers' strike.[48] The Mayor first proposed that he would support an increase in the CJA fees to $35 an hour for both in-court and out-of-court time, consistent with the legislation then pending, through the normal legislative process. This commitment by the Mayor to fund the increase was a commitment he had declined to give at the August 29 meeting with the SCTLA leaders.[49] The SCTLA representatives said, however, that the CJA lawyers would be unlikely to resume calling in for CJA assignments on the basis of a commitment to fund a bill that might pass three or four months later. The Mayor then agreed to support emergency legislation for the increase.[50] After the Mayor agreed to support emergency legislation to increase the CJA fees to $35 an hour and to support introduction of a second bill to increase the CJA fees to the $45 and $55 levels,

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[46] *Id.*

[47] I.D.F. 61 & 62. The Chief Judge also said that he was "unalterably opposed to a strike or an organized boycott as a method to bring about the needed changes." RX 140 (Letter to David B. Isbell, President, D.C. Bar Association (Sept. 10, 1983)).

[48] JX 11, at 45.

[49] JX 12, at 67 & 97; *see* text at notes 38 & 40 *supra*.

[50] JX 11, at 48.

the SCTLA representatives agreed to urge the CJA lawyers to resume calling in for cases.[51]

On September 16, the Mayor notified Councilwoman Rolark that he would "initiate reprogramming or supplemental actions . . . to ensure that the courts have adequate resources to cover the increased costs" of the proposed $35 CJA fee.[52] Councilwoman Rolark and Council Chairman Clarke, at a meeting with Ms. Koskoff and Mr. Addison, agreed to consider the bill to increase the CJA fees to $35 on an emergency basis. When Ms. Koskoff expressed concern that some of the striking attorneys might not accept the $35 proposal, Chairman Clarke and Councilwoman Rolark agreed to introduce a bill to increase the CJA fees to the $45/$55 levels, but only for future consideration in the normal course of legislative business.[53]

At Ms. Koskoff's request, the councilmembers agreed to meet with those CJA attorneys who were demanding the higher rate. Chairman Clarke told the lawyers that the increase to $35 an hour was the only increase that the Council would consider on an emergency basis and that the Council would not consider any increase if the CJA lawyers rejected the offer. He also said that the CJA lawyers must tell him by 1:00 p.m. on September 19 whether they would accept the proposed $35 increase.[54]

On September 19, 1983, the SCTLA membership voted to accept the $35 offer and end their boycott.[55]

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[51] *Id.*

[52] I.D.F. 64

[53] I.D.F. 65.

[54] *Id.*

[55] I.D.F. 66.

Later the same day, the City Council's judiciary committee met and reported out the emergency legislation.[56] On September 20, Chairman Clarke suspended the rules for consideration of the proposed increase on an emergency basis, and the increase was approved unanimously by the City Council.[57] On September 21, 1983, the CJA regulars resumed calling the CJA office to accept new cases.[58]

LEGAL ANALYSIS

I. The Boycott

On September 6, 1983, the officers of SCTLA and other CJA lawyers jointly refused to accept new CJA appointments, until the District of Columbia increased the CJA fees.[59] Their strike was successful. The city's CJA program for providing counsel to indigents approached the "brink of collapse,"[60] and the city reponded to the emergency by offering to increase the CJA fees if the respondents would end the strike. On September 19, the SCTLA lawyers voted to accept the city's proposed fee increase,[61] and they resumed accepting new CJA assignments on September 21.[62] The question before us is whether the respondents' joint and coercive refusal to deal with the city until the city raised

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[56] I.D.F. 67.

[57] I.D.F. 68.

[58] I.D.F. 69.

[59] I.D.F. 48-59. Mr. Perrotta and Ms. Koskoff did not sign the petition or vote for the strike, I.D.F. 49 & note 153, but both participated in the boycott. I.D.F. 56.

[60] I.D.F. 61.

[61] I.D.F. 66.

[62] I.D.F. 69.

the price for their services constitutes unlawful conduct under section 5 of the FTC Act.[63] We conclude that it does.

A.

We find that the city's purchase of CJA legal services for indigents is based on competition.[64] The price offered by the city is based on competition, because the city must attract a sufficient number of individual lawyers to meet its needs at that price. The city competes with other purchasers of legal services to obtain an adequate supply of lawyers, and the city's offering price is an element of that competition.[65] Indeed, an acknowledgment of this element of competition is implicit in the respondents' argument that an increase in the CJA fee was "necessary to attract, and retain, competent lawyers."[66] If the offering price had not attracted a sufficient supply of qualified lawyers willing to accept CJA assignments for the city to fulfill its constitutional obligation, then presumably the city would

[63] The "[u]nfair methods of competition" proscribed by section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), include restraints of trade violative of the Sherman Act, 15 U.S.C. § 1. FTC v. Cement Institute, 333 U.S. 683, 694 (1948).

[64] Accordingly, we reject the respondents' contention that antitrust analysis is inappropriate because the purchase of CJA services by the city does not involve competition. R.A.B. at 41-42.

[65] Counsel for the respondents acknowledged at oral argument that the preboycott CJA fees were the market (*i.e.*, the competitive) price. Transcript, Oral Argument, Feb. 7, 1985, at 52.

[66] R.A.B. at 9. The respondents suggest that a "benefit" of their boycott was an increase in the number of lawyers willing to take CJA cases. R.A.B. at 23. The Supreme Court has rejected this argument. *See* note 81 *infra*.

have increased its offering price or otherwise sought to make its offer more attractive. In fact, however, the city's offering price before the boycott apparently was sufficient to obtain the amount and quality of legal services that it needed.[67]

The lawyers who provide legal services to the city under the CJA program are competitors, individual entrepreneurs, selling their services to the District of Columbia. Each lawyer who is eligible for the CJA program is free to determine, on a daily basis, whether to accept CJA assignments at the city's offering price or to seek clients elsewhere. In making the decision whether to accept CJA assignments, the individual lawyer may consider not only the price offered by the city for CJA services but also the prices offered by other potential clients or employers.[68] The supply of lawyers to the city's CJA program depends upon these independent decisions of numerous individuals.

The number of CJA assignments available to each lawyer and, hence, his income from the CJA program, depend upon the number of indigent criminal defendants who require CJA counsel and the number of other lawyers who make themselves available for such cases, as well as the lawyer's own availability for the assignments. This competition does not differ from that confronting any lawyer – or indeed from that confronting an accountant, a plumber or any other seller of

[67] Counsel for the respondents admitted at oral argument that CJA representation before the boycott satisfied minimum constitutional standards. Transcript, Oral Argument, Feb. 7, 1985, at 53. *See also* I.D.F. 25 & note 91.

[68] The respondents also acknowledge this competition with their statement that many lawyers move from CJA practice "to a more lucrative practice as soon as they have the opportunity to do so." R.A.B. at 8.

services – whose work load and income depend upon his availability, the availability of competing providers, the demand for the service and the fee for the service.

The lawyers who sold their services to the CJA program did not and could not negotiate their fees on an individual basis because the city established one fee for all, regardless of their experience or other qualifications. Individually negotiated prices, however, are not a prerequisite for competition. In most markets either the seller or the buyer posts a price. In many indisputably competitive product markets, such as the wholesale crude oil, grain and other commodity markets, a buyer unilaterally posts an offering price and potential sellers vie with one another to determine whether they will sell at the offering price or hold out for a higher price. The challenge facing the city is the same as that facing many buyers: to announce a price sufficient to obtain the desired quantity and quality of services without paying more than the market requires. This type of pricing arrangement differs only superficially from the more usual arrangement in which offering prices are posted by the sellers. Under either price arrangement, sellers who agree among themselves to restrict supply in order to raise prices are acting in concert to force the buyer to pay a higher price.

B.

In deciding whether the respondents have unlawfully restrained competition in the market for CJA services, we first must determine whether to use a *per se* or rule of reason analysis. The choice between the two approaches depends upon "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or

instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

The *per se* rule applies to facially anticompetitive agreements, "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality – they are 'illegal *per se*.' " *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). The rule of reason applies to agreements the competitive effects of which can be evaluated only by analyzing the facts peculiar to the business and the purpose and effect of the restraint. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Whichever analysis applies, the purpose is to determine whether the conduct under scrutiny unreasonably restrains competition, and "the inquiry is confined to a consideration of impact on competitive conditions." *National Society of Professional Engineers v. United States*, 435 U.S. at 690.

We conclude, as discussed below, that the respondents' concerted refusal to deal for the purpose of raising the fees paid to them under the CJA program is unlawful and that application of the *per se* standard is appropriate on the facts of this case. We would reach the same conclusion under a rule of reason analysis.

1. *Per se* Analysis

The basic facts are not in dispute. The repondents collectively refused to accept new CJA assignments until the city increased the CJA fees. The purpose of the boycott was to increase fees. The Administrative Law Judge found, and we agree, that the respondents' boycott succeeded in forcing the city to increase the

CJA fees.[69] Such concerted action to raise prices has consistently been held unlawful by the courts. "Price is the 'central nervous system of the economy,' *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59, and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. at 692.

The respondents' boycott to raise prices directly and immediately eliminated virtually all competition among the participating lawyers for CJA appointments at the city's offering price and dramatically reduced the supply of lawyers to the CJA program. The city's ability to fulfill its constitutional obligation to supply counsel for criminal indigent defendants was severely strained, and some city officials feared a "crisis point"[70] in the CJA system. The crisis was resolved when the city capitulated to the respondents' demands and increased the CJA fees. On its face, the boycott to raise prices unreasonably restrained trade within the meaning of section 1 of the Sherman Act and section 5 of the FTC Act, and application of the *per se* rule appears to be appropriate. *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-55 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. at 692-93.

The respondents contend that a *per se* analysis of their conduct is inappropriate because any agreement among them "that could conceivably be called price-fixing as distinct from a boycott would be protected under *Noerr-Pennington.*"[71] We need not and do not

[69] I.D.F. 61 & 70.

[70] I.D.F. 61.

[71] R.A.B. at 49.

address the question of the lawfulness of any agreement on price "as distinct from a boycott." We consider only the lawfulness of the respondents' coercive concerted refusal to deal for the purpose of increasing the CJA fees, and our conclusion that the respondents have violated the law is based on that conduct, not upon their price agreement alone nor upon their preboycott collective efforts to persuade the city government, solely by the force of argument, to raise the fees.

The respondents' assertion that their boycott "is not of the type which has been held to be *per se* unlawful, *i.e.*, concerted group action to injure or eliminate a competitor of one of more of the participants,"[72] does not change our analysis. If the boycott had not had the purpose and effect of raising prices, then a more elaborate analysis might be required. Here, however, the boycott was a single course of action, a coercive, concerted refusal to deal, with a single purpose – to increase the fees paid to the boycott participants in their capacity as CJA lawyers. "[W]hen there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' " *NCAA v. Board of Regents*, 468 U.S. 85, 109 (1984), *citing National Society of Professional Engineers v. United States*, 435 U.S. at 692; *see also San Juan Racing Association, Inc. v. Asociacion de Jinetes de Puerto Rico, Inc.*, 590 F.2d 31 (1st Cir. 1979).

The conduct of the CJA lawyers in pressuring the city to increase the CJA fees clearly falls within the "generic concept of 'boycott.' " *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 541 (1978). Because it was aimed at their customer, the respondents' boycott was

[72] R.A.B. at 49.

different from those boycotts in which the target is a competiting firm and the purpose is to drive the target from the market or to impede its ability to compete.[73] Whether a concerted refusal to deal is aimed at a customer or at a competitor, however, the question remains the same: "whether the challenged agreement is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers v. United States*, 435 U.S. at 691; *accord, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. at 2620. Applying this standard to the facts before us, we conclude that application of the *per se* rule to the respondents' coercive boycott to raise prices is appropriate.

The respondents argue that they lacked the ability to set the price for CJA services,[74] because formal legislative action by the city was necessary to increase the fees, and that their conduct "is more accurately described as a horizontal price-*related* restraint"[75] than as horizontal price fixing. This does not exonerate the participants in the boycott, because the evidence shows that they coerced the city to increase the CJA fees. Indeed, the record shows that the City Council sought the

[73] Sometimes a showing of "market power or exclusive access to an element essential to effective competition" is necessary in a case involving a refusal to deal. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., ___ U.S. ___, 105 S.Ct. 2613, 2621 (1985). Proof of market power is not required here, because, "[a]s a matter of law, the absence of proof of market power does not justify a naked restraint on price or output." NCAA v. Board of Regents, 468 U.S. at 109, *citing* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

[74] R.A.B. at 48.

[75] R.A.B. at 50.

SCTLA lawyers' approval of a proposed legislative increase before the Council would act.[76]

The respondents also claim that the public service aspect of their practice of law makes the *per se* rule inapplicable, under the authority of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), at least when the conduct involved is not direct price fixing.[77] We have concluded, however, that the SCTLA lawyers' concerted refusal to deal for the purpose and with the effect of raising prices is price fixing and is therefore subject to the *per se* rule. In *Goldfarb*, the Court applied the *per se* rule to price fixing by lawyers for title examinations: "Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is 'commerce' in the most common usage of that word." *Id.* at 787-88. We discern no reason for applying a different rule here. A lawyer who provides legal representation for an indigent defendant also provides a service, and the exchange of this service for money is also commerce. The respondents, like the lawyers in *Goldfarb*, refused to provide legal services unless their price demands were met.

The respondents also contend that a *per se* analysis is inappropriate because "the political dimensions of this case . . . ensure that the usual presumptions about conduct drawn from the economic sphere simply do not apply."[78] As we discussed earlier, in determining that competition exists in the market for CJA services, principles of economics do apply to the purchase and sale of legal services for indigent criminal defendants. Those principles do not vary depending upon the identity of

[76] I.D.F. 65-66.

[77] R.A.B. at 48.

[78] R.A.B. at 48.

the sellers or of the purchaser of the service. The fact that the purchaser is a city government and the fact that the sellers are lawyers who provide a service that benefits the public have no economic significance that affects the performance of the market. The extent to which the identity of the market participants may or may not have legal significance is addressed in Part II of this opinion. None of the "political dimensions" to which the respondents allude alters the nature of their coercive boycott to increase prices, conduct with which the courts and the Commission are familiar. The boycott immediately restricted supply at the existing price and resulted in increased prices. "Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA v. Board of Regents*, 468 U.S. at 107-08.

2. Rule of Reason Analysis

We conclude that the respondents' boycott would also be unlawful under a rule of reason analysis. On its face, the boycott was a naked restraint on price and output.[79] The question under the rule of reason, then, is whether the respondents have established any countervailing competitive justifications for the restraint. *FTC v. Indian Federation of Dentists*, No. 84-1809, slip op. at 11-12 (U.S. June 2, 1986); *NCAA v. Board of Regents*, 468 U.S. at 113. It is important to note that the respondents do not claim that their boycott was "designed to 'increase economic efficiency and render mar-

[79] Although we agree with the finding of the Administrative Law Judge that the respondents had market power, *i.e.*, the ability to raise price above the competitive level, *NCAA v. Board of Regents*, 468 U.S. at 109; no showing of market power is necessary. *See* text at note 69 & note 73 *supra*.

markets more rather than less competitive.' " *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. at 20. The boycott created no new product, as in *Broadcast Music*, nor did it accompany any legitimate joint endeavor that might "increase sellers' aggregate output and thus be procompetitive." *NCAA v. Board of Regents*, 468 U.S. at 103; *see also Arizona v. Maricopa County Medical Society*, 457 U.S. at 356-57; R. Bork, *The Antitrust Paradox* 332-34 (1978).

The respondents argue in defense that the boycott was justified because of their concerns with the quality of legal services provided to indigents.[80] They suggest that the increase in CJA fees will improve the quality of legal services because individual lawyers will be able (without financial loss) to take fewer CJA cases and to devote more time to each one.[81] These asserted benefits do not amount to procompetitive efficiencies that can be achieved only by joint action.[82] The quantity and quality

[80] R.A.B. at 45-47.

[81] They also suggest that increased fees will attract more lawyers to enter and to remain in CJA practice. R.A.B. at 23. This is the likely effect of any cartel price and was rejected as a defense to horizontal restraints on price or output in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980):

> [I]n any case in which competitors are able to increase the price level or to curtail production by agreement, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants. If that potential justifies horizontal agreements among competitors . . . , it would seem to follow that the more succesful an agreement is in raising the price level, the safer it is from antitrust attack. Nothing could be more inconsistent with our cases.

[82] Less restrictive alternatives for ensuring the quality of legal services may be available. *See, e.g.*, Schwarzer, *Dealing with Incompetent Counsel – The Trial Judge's Role*, 93 Harv. L. Rev. 633 (1980).

of legal services provided by each lawyer to the CJA program necessarily depend upon his or her individual commitment of resources and ability.[83] There is no question here involving "[e]thical norms [that] may serve to regulate and promote this competition, and thus fall within the Rule of Reasons," *National Society of Professional Engineers v. United States*, 435 U.S. at 696, nor is there any "product" whose "integrity . . . cannot be preserved except by mutual agreement." *NCAA v. Board of Regents*, 468 U.S. at 102; *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-81 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

The argument that higher CJA fees would result in higher quality legal services is not an argument that the boycott promoted competition. Rather, it is an argument that the respondents should be permitted to replace the competitive price with their preferred price. The respondents seek to impose their "views of the costs and benefits of competition on the entire marketplace." *National Society of Professional Engineers v. United States*, 435 U.S. at 695; *see also FTC v. Indiana Federation of Dentists*, slip op. at 14.

This argument, that the adverse effects of competition on the quality of services justifies price fixing, was squarely rejected by the Supreme Court in *National Society of Professional Engineers v. United States*, 435 U.S. at 695:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices but also better goods and services. . . .

[83] Incompetent lawyers would not be deterred by supra-competitive prices. The Administrative Law Judge concluded that the fee increase was unlikely significantly to improve the overall quality of indigency representation. I.D.F. 72.

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

Each of the respondents was free individually to decide that he or she could not provide adequate legal services at the price the city was offering under the CJA program to seek other clients, but their collective agreement to withhold their services until a price increase was enacted is unlawful. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 696; *accord, NCAA v. Board of Regents*, 468 U.S. at 117; *see also FTC v. Indiana Federation of Dentists*, slip op. at 15.

In the usual case involving conduct that is a naked restraint of trade for which no competitive justification exists, it is unnecessary to examine anticompetitive effects. *See Arizona v. Maricopa County Medical Society*, 457 U.S. at 335-57; *National Society of Professional Engineers v. United States*, 435 U.S. at 692. In this case, however, the Administrative Law Judge dismissed the complaint on the ground that there were "no adverse effects in the special circumstances of the 1983 boycott," because the city was "supportive of the boycotters' demands."[84] We disagree, and we find that the boycott did result in anticompetitive effects.

First, the SCTLA lawyers, acting in concert, directly and immediately restrained competition among themselves. They explicitly agreed that they would not provide legal services to the city until their price demands were met. This concerted refusal to deal elim-

[84] I.D., slip op. at 93.

inated competition among the SCTLA lawyers. The boycott dramatically reduced the supply of lawyers to the city's CJA program and adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants. The city capitulated to the respondents' demands. The boycott forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the respondents. The city must, as a result of the boycott, spend an additional $4 million to $5 million a year to obtain legal services for indigents.[85] We find that these are substantial anticompetitive effects resulting from the respondents' conduct.

The Administrative Law Judge also concluded that "the boycott was viewed by city officials as the only feasible way of getting a rate increase," [86] that the city was "supportive of the boycotters' demands," [87] and that the respondents' conduct was "accompanied by the buyer's knowing wink." [88] We find that the record does not support these conclusions.

The record shows that the District government increased the fees for lawyers under its CJA program only when it was coerced by the respondents to do so.[89] Although Chief Judge Moultrie of the District of Columbia Superior Court, the Mayor, and some members of the City Council and of the Mayor's staff expressed sympathy with the respondents' desire for increased CJA

[85] I.D.F. 71.

[86] I.D., slip op. at 96.

[87] I.D., slip op. at 93. Judge Needelman elsewhere describes the city's role as "ambivalent." I.D., slip op. at 92 n.222.

[88] *Id.* at 93.

[89] *See* I.D.F. 61 & 70.

fees, the city declined in 1982 and in 1983 before the boycott to enact an increase because of budgetary constraints.[90] When the boycott was put into effect, the city government responded to deal with the "crisis," [91] to reestablish the CJA program as quickly as possible. Although the Chief Judge supported a fee increase to end the boycott, he expressly disapproved the respondents' boycott tactics.[92] In order to end the boycott, the Mayor proposed and the City Council enacted emergency legislation. The record shows a direct causal link between the respondents' coercive boycott and the city government's capitulation to their demands. Indeed, the City Council sought the respondents' approval of the proposed legislative increase in fees before it would act.[93] We find nothing in these events to support the Administrative Law Judge's conclusion that the city supported the boycott.

Even if proved, the acquiescence or support of some members of the city government would not immunize the respondents' boycott to increase prices from the antitrust laws. This defense was considered and rejected in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 226, where the Supreme Court said: "Though employees of the government may have known of those [price stabilization] programs and winked at them or tacitly approved them, no immunity would thereby have been obtained." The Court reasoned that if such a "knowing wink" defense to the antitrust laws were permitted, national competition policy would be determined "not by

[90] I.D.F. 36, 37 n.127 & 42-43.

[91] Carter Tr. 104-05.

[92] I.D.F. 62 & note 192.

[93] I.D.F. 65-66.

Congress nor by those to whom Congress had delegated authority but by virtual volunteers." [94] Accordingly, we reject the so-called "knowing wink" defense on both the facts and the law.

C.

Finally, the respondents argue that, for various reasons unique to this market, antitrust analysis is simply inappropriate in this case. We have already addressed and refuted their principal argument that competition does not exist in the market for CJA services. After considering the respondents' other reasons for questioning the applicability of the antitrust laws to their conduct, we conclude that it is appropriate to apply the antitrust laws in this case.

According to the respondents, the economic principles underlying the antitrust laws do not apply to the purchase and sale of CJA services, because "it is in the [District] government's interest from an economic standpoint to provide the poorest possible quality of [CJA] services." [95] Their explanation for this provocative assertion is that if the city buys better quality legal services for indigent criminal defendants, its "opponents in court," then the city will also have to pay more for better prosecutors and additional court staff.[96] We disagree with their assessment of the city's economic interest.

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[94] 310 U.S. at 227. *See also* California Retail Liquor Dealers Ass'n v. Miscal Aluminum, Inc., 445 U.S. 97, 106 (1980); Fischel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 95 (1977).

[95] R.A.B. at 43.

[96] R.A.B. at 42 (emphasis omitted).

One of the District's functions as a unit of government is to provide a system for the administration of justice consistent with our national commitment to substantive and procedural fairness. The provision of effective counsel to indigent criminal defendants is an essential part of such a system. In addition to its inherent governmental interest in seeing justice accomplished, the city, as the respondents correctly note, is also required by law to provide effective counsel to indigent defendants. We have no reason to doubt that the city government is philosophically as well as legally committed to providing effective counsel for indigent criminal defendants.

We also have no reason to doubt that the District has an interest in the efficiency of its judicial system. But it simply does not follow that the city affirmatively prefers to offer the "poorest possible quality of services." Indeed, the efficiency of our adversarial system of justice is undoubtedly affected adversely when one of the parties is inadequately represented, and the cost of providing poor quality legal representation, which may result in appeals on the ground of inadequate counsel and in reversals, could be high. We conclude that the city's economic interest is in obtaining a quality of service sufficient for its needs at the lowest price. We reject as a matter of economic theory the notion that the District government affirmatively preferred lower quality CJA representation, and we find that the record evidence does not support such a preference as a matter of fact.

The respondents also suggest that antitrust analysis is inappropriate in this case, because the application of antitrust principles somehow threatens to drive the quality of CJA legal representation below an acceptable level. Their theory is that to apply the antitrust laws

here might "endanger the Sixth Amendment right to effective counsel," [97] because "*effective* assistance of counsel . . . necessarily requires a level of compensation sufficient to produce this result, regardless of whatever [price] level antitrust and economic analysis would determine to be optimal or even adequate." [98] This is the economic version of the legal argument we rejected earlier, when we concluded that an interest in providing higher quality service does not provide sufficient justification, under a rule of reason analysis, to excuse the respondents' conduct.

The respondents are saying that in this market, as opposed to all other markets, a price higher than the competitive price is necessary to ensure the requisite quality of services. We disagree. As the Supreme Court has recognized, the economic theory underlying the antitrust laws is that competition will result in an optimal price-quality mix for goods and services. Recently, in *NCAA v. Board of Regents,* 468 U.S. at 104 n.27, the Court said:

> "The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. . . ." *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 4-5 (1958).

Accord, National Society of Professional Engineers v. United States, 435 U.S. at 695.

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[97] R.A.B. at 43.

[98] *Id.*

The respondents' argument also ignores substantial judicial precedent that "foreclose[s] the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *National Society of Professional Engineers v. United States,* 435 U.S. at 689 (citations omitted); *accord, Arizona v. Maricopa County Medical Society,* 457 U.S. at 349-55 & 350 n.22; *United States v. Socony-Vacuum Oil Co.,* 310 U.S. at 221-22; *United States v. Trans-Missouri Freight Association,* 166 U.S. 290 (1897). A similar argument was made in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), where the Court concluded that the public service aspect of the practice of law does not provide an exemption from the Sherman Act. Although the Court noted that "[t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act," *id.* at 788 n.17, the Court rejected the notion that the antitrust laws should not apply in the first place.

As the Court noted in *Professional Engineers,* competition may force prices down and an inexpensive service may be inferior to one that is more costly. 435 U.S. at 694. Based on these considerations, the city might determine that its interest in quality can be satisfied at a lower price, or an individual lawyer might independently determine that he or she cannot provide adequate services at the price offered by the city. We see no reason to suppose, however, that the District would ever purchase services inadequate to meet its obligations under the law. Application of the antitrust laws does not change the fact that a manufacturer of complex equipment will not buy component parts that

do not meet its product specifications. The same is true here. Regardless of whether we apply the antitrust laws in this case, the District will not purchase less than effective counsel, because that would not satisfy its requirements. In purchasing legal representation for indigent criminal defendants, presumably the District will seek the best price for the quality of representation it requires. To ensure a competitive market, application of the antitrust laws is entirely appropriate.

Finally, we reject the argument that the "political dimension" of this case makes antitrust analysis inapposite. The respondents claim that because the CJA program is legislatively created to comply with constitutional obligations, "there can be no presumption that an increase in price is due to cartelization and a restriction of output, rather than to political action that has shifted out the demand curve,"[99] and that "the straightforward inferences that can be drawn in normal economic markets about which actions are coercive and which are not are simply not available."[100] Our conclusions in this case are not based on presumptions and inferences, but rather on specific findings that the SCTLA lawyers' boycott restrained competition and forced the city to act to increase prices. To the extent that the respondents' arguments imply that competition does not exist in the market for CJA services, we reject them for the reasons discussed above. To the extent that these arguments imply that a political dimension negates the evidentiary findings of cause and effect in this case,[101] we reject them as against the weight of the evidence.

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[99] R.A.B. at 44.

[100] *Id.*

[101] *See* I.D.F. 70.

II. Immunity Under the First Amendment

The respondents assert that their conduct constituted political activity to influence legislation that is protected by the First Amendment from scrutiny under the antitrust laws. This defense often arises in antitrust cases where, as here, the conduct at issue involves efforts to obtain governmental action. In antitrust cases, the defense usually arises under the *Noerr-Pennington* doctrine,[102] which is generally understood to immunize from the antitrust laws political activity, undertaken for anticompetitive purposes, to influence public officials to take action that would produce anticompetitive effects.

The First Amendment right to petition also has been asserted as a defense in cases involving boycotts undertaken to further goals extrinsic to the competitive process, where the boycott is not particularly directed to influencing competition in a product market or relevant line of commerce. These cases, involving consumer boycotts organized to promote various social, religious or political goals, we will call, for ease of reference, the political boycott cases. Either line of authority, if it applies, could immunize from liability those who participated in the boycott of the District of Columbia's CJA program.

The political boycott cases involve conduct that was initiated by consumers for the purpose of influencing governmental policy-making to further social and political goals. The respondents claim that their conduct is entitled to immunity under the political boycott cases, because their purpose was "to obtain more effective counsel for indigent criminal defendants in furtherance

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[102] United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

of their Sixth Amendment rights."[103] We disagree. Unlike the political boycott cases, the boycott of the CJA program was agreed upon among competitors and was designed to restrain competition for their direct economic benefit. The members of SCTLA explicitly sought to force concessions from the District government in its role as a buyer of services rather than its role as a policy maker. Because the boycott of the CJA program was undertaken to improve the economic well-being of the participants as competitors in the market for CJA services, the political boycott cases do not apply and we must examine the conduct under the antitrust laws and address the applicability of the *Noerr-Pennington* doctrine.

The First Amendment, as applied to antitrust cases through the *Noerr-Pennington* doctrine, protects a variety of petitioning conduct undertaken for anticompetitive purposes to produce anticompetitive effects through governmental action. The case before us, however, involves a coercive boycott rather than the kind of petitioning activity protected in *Noerr*. This kind of coercive conduct does not warrant immunity from the antitrust laws. Second, this is not an appropriate case in which to invoke the protections of *Noerr-Pennington*, because the anticompetitive effects of the respondents' conduct were brought about not by the governmental action to which the conduct was addressed, but rather resulted directly from the respondents' conduct. A fundamental principle underlying all the cases in the *Noerr-Pennington* line of authority is that immunity from the antitrust laws is contingent on the fact that the restraint of trade in question has been brought about by government rather than private action. Here the joint action of private individuals generated the restraint and

[103] R.A.B. at 30.

the government was simply a customer who, like any other customer, had a valid interest in obtaining a competitive price. As explained more fully below, we find no immunity for the respondents under the cases dealing with efforts to influence governmental action.

A. *Political Boycotts*

Those who have engaged in political boycotts have invoked the First Amendment to protect themselves from various legal sanctions. *E.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).[104] In *Claiborne Hardware*, the Court held that the nonviolent elements of an NAACP-inspired boycott of white merchants "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself" were entitled to First Amendment protection. 458 U.S. at 914. The Court said that "[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Id.* at 913. Similarly, in the *NOW* case, the court held that NOW's boycott of convention facilities in states that had not ratified the Equal Rights Amendment was privileged activity protected from state tort law claims

[104] Although they have included counts under state and federal antitrust law, the political boycott cases basically sound in tort. In *Claiborne Hardware*, for example, the Mississippi Supreme Court affirmed liability on the common law tort theory but dismissed the state antitrust claim. The Supreme Court, noting that no antitrust questions were before it for consideration, 458 U.S. at 915 n.49, addressed only the propriety of the common law tort holding under the First Amendment.

under the First Amendment. 620 F.2d at 1317-19.[105] In addressing the antitrust count, the court reviewed the legislative history of the Sherman Act and concluded that the Act does not prohibit "a boycott in a non-competitive political arena for the purpose of influencing legislation." *Id.* at 1315.

The respondents seek to characterize their boycott as a political boycott and, therefore, protected speech under the First Amendment within the meaning of *Claiborne Hardware* and *NOW*. They say that the "essence" of their argument is that the protection given to speech under the First Amendment should be extended to conduct "at least when undertaken for the *purpose* of securing Constitutional rights"[106] and that "a principal purpose [of] such 'speech' was to obtain more effective counsel for indigent criminal defendants in furtherance of their Sixth Amendment rights."[107] The legislation that the respondents sought was an increase in the fees paid to them under the city's CJA program. Because there is no constitutional right, presumably, to be paid $35 or $45 an hour, the respondents' argument depends upon the factual assumption that the purpose of their boycott was, as asserted, "to obtain more effective counsel for indigent criminal defendants in furtherance of their Sixth Amendment rights." Although we have no reason to doubt that the respondents are indeed concerned about Sixth Amendment rights, we find, as discussed below, that the purpose and effect of their conduct was commercial, not political, as evidenced by the facts that they were competitors and that

[105] This holding was cited with approval in *Claiborne Hardware*, 458 U.S. at 914 n.48.

[106] R.A.B. at 37 & 35-40, generally.

[107] R.A.B. at 30.

their primary object was to promote their own economic well-being. Accordingly, their conduct is not immune from the antitrust laws under *Claiborne Hardware* and *NOW*.

The participants in the *Claiborne Hardware* and *NOW* boycotts were plainly motivated by social concerns, and both courts considered the purpose of the boycott in holding that the conduct was protected. The boycotters were consumers who brought economic pressure to bear by their collective purchasing decisions and who were motivated by noncommercial concerns.[108] In *Claiborne Hardware*, the purpose of the boycott was "to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice." 458 U.S. at 907. Although the boycott directly affected the white merchants' business, the boycotters were not in competition with the white merchants and did not by their conduct seek to further their own competitive position. *Id.* at 915.[109] Similarly, in *NOW*, the

[108] As used here, a group's purpose is "commerical" or "economic" if the group is made up of competitors and the objective is profit. A noncommercial boycott is motivated by political, social, religious or other noncompetitive purpose, and the members of the group lack a significant business interest in the goal of the boycott. *See* Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals To Deal*, 1970 Duke L.J. 247, 248-50 (1970); Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Nw. U.L. Rev. 705, 712-13 (1962); Note, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131, 1133 (1980).

[109] The boycotts shared an interest in the well-being, economic or otherwise, of blacks generally, just as the boycotters in *NOW* sought equal rights for women. This general interest in the well-being of the group, however, is different from the immediate financial or commercial interest of a business or provider of services in the competitive state of the market in which it competes. *See* Coons, *supra* note 108, at 712-13.

purpose of the boycott was to bring economic pressure to bear on the states that had not ratified the Equal Rights Amendment. The members of NOW who instigated the boycott were not in competition with one another or with the targets of the boycott, and they were not motivated by their own commercial interests. 620 F.2d at 1311-12.[110]

In *Claiborne Hardware*, the "purpose" of the boycott "was not to destroy legitimate competition" but rather "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself." 458 U.S. at 914. The Court quoted with approval Judge Ainsworth's distinction between, on the one hand, boycotts by those who "were in competition" with merchants who would be injured, boycotts that arise "from parochial economic interests" and boycotts "organized for economic ends," and, on the other hand, boycotts "to protect racial discrimination," which constitute "essential political speech lying at the core of the First Amendment." *Id.* at 914-15, *quoting Henry v. First National Bank of Clarksdale*, 595 F.2d at 303.

In *NOW*, the court made the same distinction between boycotts intended to affect competition and boycotts intended to promote other interests:

> In the instant case, an infringement upon the people's right to petition the government by a boycott should also not be lightly attributed to Congress. We perceive a more accurate phrasing of Congress' concern to be not the elimination of boycotts, but elimination of *boycotts used by a competitor against a competitor (or against a supplier, customer, etc.)* in the business of competing.

620 F.2d at 1310 (emphasis added). The "orientation" of NOW in organizing the boycott on behalf of the ERA was "not one of profit motivation." *Id.* at 1312. The "crux of the issue," according to the court, was "that NOW was politically motivated to use a boycott to influence ratification of the ERA." *Id.* at 1314. The court clearly distinguished between politically motivated boycotts and anticompetitive boycotts cognizable under the antitrust laws.

As the respondents note, Justice O'Connor addressed the significance of purpose in her concurring opinion in a case involving First Amendment claims of freedom of association. *Roberts v. United States Jaycees*, 468 U.S. 609, 631 (1984). She said that in determining whether an association is "primarily engaged in protected expression," the "purposes of an association, and the purpose of its members in adhering to it, are doubtless relevant . . . ." As examples, she stated that "[l]awyering to advance social goals may be speech" while "ordinary commercial law practice is not," and that a boycott "for political purposes" may be speech, whereas one "for purposes of maintaining a cartel is not." *Id.* at 636.

Because these cases focus on the purpose of the conduct, we turn now to an examination of the respondents' purpose for boycotting the CJA program. Although the participants in a boycott may have both political and economic interests in the results they seek to achieve, the question we must consider is which of their concerns provided the incentive that caused them to act.[111]

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[110] In *Claiborne Hardware*, as in *NOW*, the noncompetitive context of the boycott was important in distinguishing political from antitrust boycotts. 458 U.S. at 915. *See also* Henry v. First National Bank of Clarksdale, 595 F.2d 291, 303-04 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (upholding federal district court injunction against execution of state court judgment in *Claiborne Hardware, Inc. v. NSSCP*, No. 78,353 (Miss. Ch. Ct. Aug. 9, 1976)).

[111] *See* Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. Cal. L. Rev. 983, 989-91 (1982).

Although we do not question the respondents' genuine concern for their clients, we find unpersuasive the respondents' argument that they undertook their coercive course of conduct for altruistic rather than for commercial purposes. We find instead that the respondents' purpose in conducting the boycott was to improve their own economic well-being. Unlike the situations in *Claiborne Hardware* and *NOW*, where the objective of the participants in the boycott was independent of the economic harm the boycott imposed, here the objective is precisely that harm – to reduce output and raise prices.

The SCTLA petition announcing the boycott plainly reflected and only reflected the respondents' economic purpose: "unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act."[112] Unlike the boycotts in *Claiborne Hardware* and *NOW*, this boycott took place in a competitive commercial context. The goal of the participants in this boycott was directly related to their own economic self-interest in the level of fees paid to them. The individual CJA lawyers were in competition with one another for appointments to represent criminal indigent defendants under the city's CJA program. The target of the boycott, the city, was a purchaser of their services. The Administrative Law Judge found, and we agree, that the "immediate goal" of the respondents' boycott was to increase the fees paid to them as CJA lawyers.[113]

Usually our inquiry under the political boycott cases need go no further. Where, as here, a group of competitors acts in concert with the purpose and effect of

[112] CX 4B-D.

[113] I.D.F. 57.

forcing their customer to pay a higher price for their services, the mere assertion or even the existence of an additional, social concern does not transform their anticompetitive conduct into conduct entitled to immunity from the antitrust laws under the political boycott cases. Rather, as the Court said in *Claiborne Hardware*, "even though [governmental] regulation may have an incidental effect on rights of speech and association . . . [t]he right of business entities to 'associate' to suppress competition may be curtailed." 458 U.S. at 912. In these circumstances, the usual rule of antitrust cases, that good intentions will not protect otherwise unlawful conduct, applies. *See, e.g., National Society of Professional Engineers v. United States*, 435 U.S. at 688-90; *Chicago Board of Trade v. United States*, 246 U.S. at 238.

In this case, however, we go on to consider the conclusion of the Administrative Law Judge that the boycott was not unlawful, because an increase in the CJA fees was necessary to "satisfy the 'political' (*i.e.*, constitutional) requirement of effective representation."[114] As discussed above, the law rejects the notion that restraints on competition can be justified by a purpose to establish, for example, a "reasonable" price, and the asserted need for an increase in the CJA fees is irrelevant to antitrust liability. Even assuming the relevance of any need for higher fees, however, we find that the evidence does not support the Administrative Law Judge's conclusion.

The Administrative Law Judge's conclusion and the respondents' assertion that "the boycott was undertaken primarily [[115]] to effect the Sixth Amendment

[114] I.D., slip op. at 94.

[115] Even the respondents do not assert that their *only* motive was to promote the interests of indigent criminal defendants.

right to counsel"[116] suggest that the Sixth Amendment rights of indigent criminal defendants were in jeopardy. Yet the record shows that the quality of representation provided by CJA lawyers before the boycott was adequate under Sixth Amendment standards.[117] If the city's fees for CJA lawyers had been inadequate to elicit competent counsel for indigents, a history of reversals of criminal convictions on Sixth Amendment grounds would have signalled that inadequacy. In fact, such reversals were exceedingly rare.[118] Counsel for the respondents acknowledged in oral argument that the quality of representation under the CJA program was sufficiently competent to meet the constitutional standard.[119] The asserted constitutional concern with the quality of representation for indigents is simply not supported by a record of failure by CJA lawyers to meet constitutional standards of representation at the pre-boycott fees.

According to the respondents, if the fees paid to them as CJA lawyers were increased, they would be able to devote more hours to fewer cases, thereby provide better representation and still end up with an adequate annual income.[120] It may well be true, as the Adminis-

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[116] R.A.B. at 31.

[117] I.D.F. 25. The Administrative Law Judge also found that the consensus was that the pre-boycott quality of representation had improved markedly. *Id.*

[118] In the three and one-half years preceding the SCTLA boycott, only one or two cases were reversed on Sixth Amendment grounds. CX 38K (Following Hearings on District of Columbia Appropriations for Fiscal Year 1984: Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 98th Cong., 1st Sess. 242 (September 27, 1983) (statement of Ralph Perrotta, president, SCTLA)).

[119] Transcript, Oral Argument, Feb. 7, 2985, at 53.

[120] Perrotta Tr. 726-28; Koskoff Tr. 834; Addison Tr. 886-88.

trative Law Judge found, that the respondents believed that the level of CJA fees adversely affected the quality of representation they provided.[121] But this belief does not make their boycott "essential political speech," entitling them to immunity under the political boycott cases. Rather, their concern about the adequacy of their incomes confirms that theirs was "a boycott organized for economic ends," different in purpose from political boycotts and subject to governmental regulation. *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 914-15; *see National Society of Professional Engineers v. United States*, 435 U.S. at 692-96.

We agree that effective representation for indigent criminal defendants is an important social goal. The goal is expressed in the Sixth Amendment to the Constitution, and it is implemented in the District's Criminal Justice Act. If a group of citizens who would not stand to benefit personally from an increase in CJA fees engaged in a boycott to promote this goal, their conduct might well merit immunity under the political boycott cases. But that situation is not before us. Here, where the immediate goal of the boycott – higher fees – directly benefited the participants, the respondents' attempt to elevate their "political" concerns over their own personal interests in obtaining higher fess in not convincing.

The concern of the CJA lawyers with the level of fees paid to them is familiar in a commercial setting. The same concern is evidenced by a sales clerk who, in order to earn a higher sales commission, stresses to a customer the merits of a cashmere sweater over those

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[121] I.D.F. 57. The Supreme Court has rejected the notion that quality of professional services necessarily is related to the level of fees charged. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 378-79 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 7[illegible]8, 766-69 (1976).

of a less expensive version in lambswool. Adding a public service gloss does not change the essential nature of the concern. *See National Society of Professional Engineers v. United States,* 435 U.S. at 692-96. The respondents' counsel acknowledged this in oral argument:

> There [was] a Chevrolette [*sic*] sort of quality . . . service being provided. There were some people who though we really ought to have an Oldsmobile quality service.[122]

What the respondents are really suggesting is that they should be allowed to force their collective judgment of the appropriate price-quality mix for legal services on the city. To continue the analogy, they want the privilege to coerce the District of Columbia to pay Oldsmobile prices, so that they can profit from the result. We conclude that the respondents' purpose was promotion of their own economic interests and that their conduct is not protected political speech within the meaning of *Claiborne Hardware.*

B. *Conduct in Pursuit of Anticompetitive Goals*

Having found that the respondents' boycott was motivated primarily by their commercial interest in higher fees rather than by social or other noncommercial concerns, we next consider the applicability of the cases that involve conduct in pursuit of anticompetitive goals.[123] Under this line of authority, generally known

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[122] Transcript, Oral Argument, Feb. 7, 1985, at 53.

[123] To avoid confusing these cases with those addressed in the preceding section, it is important to remember two points. First, like the political boycott cases discussed in the preceding section, some of these cases involve boycotts, but, because they involve

as the *Noerr-Pennington* doctrine, the First Amendment rights of association and petition protect from the antitrust laws efforts by competitors to persuade a government body or official to take action that would restrain competition. In the *Noerr-Pennington* cases, where the defendants' purpose is assumed to be competitive gain, the focus in determining whether antitrust immunity should attach is on the nature of the conduct and on the fact that government is the source of the anticompetitive restraint. The emphasis of the respondents' argument under this line of authority shifts, appropriately enough, from their assertions of selfless motivation to the fact that the boycott was directed to the city government. Regardless of their motivation, they note that "the sole purpose" of the boycott "was to influence legislation."[124]

In certain respects, this case is indeed like *Noerr* and *Pennington.* In those cases, as here, the goal of the defendants was to influence the government and the motive was anticompetitive. In *Noerr,* the defendant railroads allegedly engaged in an unfair and deceptive publicity campaign in violation of the Sherman Act aimed at changing state law and law enforcement practices. Their "sole motivation" was to injure their competitors in the trucking industry. 365 U.S. at 129. The Court said that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws," *id.* at 135, that this

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anticompetitive conduct, these are antitrust rather than political boycotts. Second, in the *Noerr-Pennington* cases, the phrase, "political activity" refers to the fact that the defendants seek governmental action and does not refer to the motivation of the defendants in doing so.

[124] R.A.B. at 30.

principle is clear "at least insofar as those activities comprised mere solicitation of governmental action." *id.* at 138 and that the legality of such activity "was not at all affected by any anticompetitive purpose it may have had." *Id.* at 140. In *Pennington*, a union and certain mine operators were charged with violating the Sherman Act for having jointly "approached' the Secretary of Labor to establish a minimum wage and for having petitioned TVA officials to limit coal purchases from mines exempt from the minimum wage standard. 381 U.S. at 660-61. The Court affirmed that an anticompetitive purpose by itself is not sufficient reason to subject to the Sherman Act efforts to influence public officials. *Id.* at 669-70.

But this case also differs from *Noerr* and *Pennington* in two major respects. First, the respondents' conduct was different. They did not merely solicit governmental action or attempt to influence the decisions of public officials through meetings or a publicity campaign. Instead, they engaged in a coercive boycott. Second, the anticompetitive effects of the respondents' activity resulted directly from the boycott itself and not from the independent action of the government. The fact that the participants in the boycott of the District's CJA program sought action from the government, therefore, does not end our inquiry. To determine whether the respondents' boycott warrants *Noerr-Pennington* immunity, we must examine the nature of their conduct. Then we will turn our attention to the source of the anticompetitive restraint. Finally, we will address certain other cases in which the government itself has been the victim of an anticompetitive restraint.

1. *Nature of the conduct*

We have found scarce authority addressing whether immunity should be granted to conduct essentially like

that at issue here, but the cases do provide guidance for making that determination. The principle underlying the need for immunity is, of course, the First Amendment right to petition the government.[125] If the respondents' activity had been limited to "mere attempts to influence the passage or enforcement of laws," *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 135, then the respondents would merit the protection of the First Amendment under *Noerr* and succeeding cases. Not all methods of communicating with the government, however, are protected from the antitrust laws by the First Amendment. Because the respondents' activities were not limited to mere petitioning, we must review their conduct in light of the principles the cases have established.

The Court in *Noerr* made clear that concern over the right to petition was paramount to its conclusion.[126] The Court recognized the legitimacy of the power of government to restrain trade and the need to protect "the ablility of the people to make their wishes known to their representatives," 365 U.S. at 137, and emphasized

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[125] The First Amendment protects freedom of speech and of the press, the right peaceably to assemble and the right to petition the government. In this opinion, we use "right to petition" to encompass First Amendment rights generally. *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) (First Amendment rights, "though not identical, are inseparable").

[126] At least one commentator maintains that the holding in *Noerr* was based solely on construction of the Sherman Act and that the First Amendment basis for the doctrine was not developed until *California Motor Transport.* Fischel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 82-84 (1977).

its concern over the implicit constitutional questions in the case:

> The right of petition is one of the freedoms protected by the Bill of Right, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 138. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), the Court further examined the relationship between First Amendment rights and the scope of the antitrust laws:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

It is important to remember that in *Noerr*, the defendant railroads engaged only in a publicity campaign in which they used "[c]irculars, speeches, newspaper articles, editorials, magazine articles, memoranda and . . . other documents" in an attempt to influence the government. 365 U.S. at 142.

The Supreme Court took care to distinguish the publicity campaign in *Noerr* from the kind of anticompetitive conduct at issue here. The Court said that associations that attempt to persuade the government to take particular action that would produce a restraint or a monopoly "bear very little if any resemblance to the combinations normally held violative of the Sherman Act." *Id.* at 136. The Court described the latter kind of combination as one in which

> the participants will jointly give up their trade freedom, or help one another to take away the trade

> freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

Id. Notably, the Court stated that in the case before it, there were "no specific findings that the [defendant] railroads attempted directly to persuade anyone not to deal with" their trucker competitors. *Id.* at 142. These passages suggest that the Court probably would have reached a different result had the conduct before it been more akin to that before us today.

First Amendment rights are not absolute. The Court has consistently held that some conduct is subject to regulation to preserve other legitimate government interests, even though the conduct has a communicative aspect. *E.g., Roberts v. United States Jaycees*, 468 U.S. at 628. In *California Motor Transport*, the Court said that "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." 404 U.S. at 514. In *Claiborne Hardware*, the Court explained that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances." 458 U.S. at 912, *citing United States v. O'Brien*, 391 U.S. 367 (1968). Even though the "regulation may have an incidental effect on rights of speech and association . . . [t]he right of business entities to 'associate' to suppress competition may be curtailed." 458 U.S. at 912, *citing National Society of Professional Engineers v. United States*, 435 U.S. at 697.

There are many different ways to communicate, ranging along a broad spectrum from pure speech to violent actions. In this case, for example, the respondents ini-

tially chose to communicate their collective view that an increase in the CJA fees was desirable by speaking to members of the city govenment and other individuals who were thought to be influential.[127] Although some commentators have suggested that such activity alone should be unlawful,[128] we need not and do not address that question here. We think it is clear, however, that if the respondents had elected to kidnap a city official and to hold him hostage until their demands were granted, their conduct would be subject to governmental regulation, despite its communicative aspect. *See NAACP v. Claiborne Hardware, Inc.*, 458 U.S. at 933; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501 (1949) (no "constitutional right . . . to violate valid laws designed to protect important interests of society"); *Thomas v. Collins*, 323 U.S. 516 (1945).[129] The mere fact that the purpose of the scheme was to obtain governmental action would not change the character of the conduct from unlawful kidnapping to speech protected from regulation by the First Amendment.[130]

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[127] I.D.F. 37-40.

[128] I P. Areeda & D. Turner, *Antitrust Law* ¶ 205, at 51-52 (1978) (hereafter "Areeda & Turner"), suggest that discussions among competitors concerning an appropriate price for their product in order to petition government for price support legislation "should constitute unlawful price collaboration, because their discussions create a severe danger for competition without being, in any way, indispenable for conducting protected political activity." *Id.* at 52.

[129] In *Thomas v. Collins*, 323 U.S. at 537-38, the Court said that attempts to persuade are within the First Amendment, but "[w]hen to this persuasion other things are added which bring about coercion, . . . the limit of the right has been passed."

[130] *See* Note, *Noerr-Pennington Immunity from Antitrust Liability Under Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception with a Constitutional*

To help us determine where the boycott of the CJA program should be placed on the spectrum of ways to communicate, let us briefly return to the competitive context in which it occurred. The city, in order to fulfill its constitutional obligation to provide counsel to indigent defendants, offered to pay a fee to attorneys under the city's CJA program. Before the boycott, the number of lawyers who responded to the city's offer was apparently sufficient to meet the city's needs.[131] At least, the city saw no need to increase the offering price to attract a greater number of lawyers.[132] None of the lawyers who served the city's CJA program was obligated to accept the city's price. Each was free to sell his services to the city or to seek clients elsewhere. If too few lawyers responded to the city's offering price, then presumably the city would independently have determined to increase its offering price. The boycott of the CJA program disrupted this competitive process. The resulting anticompetitive effects were immediately felt

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Analysis, 69 Cornell L. Rev. 1305, 1323-25 & 1324 n.130 (1983):

> If a [terrorist kidnapping or the bribery of a public official] is undertaken with a genuine desire to influence governmental decisionmaking, then it is bona fide petitioning activity. However, it would be ludicrous to assume that such behavior merits protection under the first amendment given the government's overriding interest in restricting such behavior.

[131] During the strike, only three or four CJA lawyers called in daily. *See* note 43 *supra*.

[132] The record shows that in 1982 and in 1983 before the boycott, the city considered but did not enact legislation that would have increased the CJA fees because of lack of money to fund such an increase. *See* I.D.F. 36, 42 & 43. Nevertheless, the CJA system worked until the respondents instituted their boycott. *See* I.D.F. 60-62 & 70.

by the city, because the number of lawyers willing to accept employment at the city's offering price shrank dramatically.[133]

This disruption of the normal channels of government decision-making is wholly unlike lobbying, and the policy reasons for protecting lobbying do not apply to it.[134] Lobbying is an attempt to influence or persuade or inform, where the channels of government are open to conflicting views and where the government, although presumably responsive to the concerns of constituents, retains its authority to weigh competing considerations and to determine policy independently. The respondents abandoned their attempts to persuade the government to act when the city failed to act favorably to their interests. They elected instead to engage in a coercive price-fixing boycott to get their way. Clearly, they went beyond persuasion as a technique to influence the government. The CJA lawyers successfully forced the city government to resolve the crisis in the city's criminal justice system, that the lawyers themselves intentionally had created, in the manner they demanded.

The Administrative Law Judge suggested that the respondents' abandonment of persuasion in favor of coercive conduct was justified because their pre-boycott efforts to obtain a fee increase were unsuccessful.[135]

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[133] I.D.F. 60 n.187 & 61.

[134] Areeda & Turner, *supra* note 128, at 52, suggest that *Noerr* immunity should not extend to conduct that creates a severe danger to competition, when less dangerous alternatives are obviously available and the conduct is not a customary form of lobbying.

[135] *See* I.D.F. 34. Judge Needelman's decision implicitly suggests that the preboycott price was unreasonable and that the boycott was therefore in the public interest. Neither of these implicit justifications is cognizable under the antitrust laws. *See* National

We reject this suggestion. Virtually every issue a government entity must address will involve resolution of conflicting views of what the result should be. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 144-45. The First Amendment right to petition the government does not include the right to be effective.

The means employed by the respondents were those usually held unlawful under the antitrust laws: collective action by competitiors to set the terms at which they will sell. *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). As the Court said in *Pennington*, "It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that runs counter to antitrust policy." 381 U.S. at 668. In both *Noerr* and *Pennington*, the Court distinguished precisely this kind of private action in restraint of trade from petitioning that is immune from the antitrust laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 136; *United Mine Workers v. Pennington*, 381 U.S. at 668.

We think that *Noerr* and *Pennington* alone provide sufficient guidance for our conclusion that First Amendment immunity should not extend to the kind of conduct in which the respondents have engaged. We would reach the same conclusion, however, under a general First Amendment analysis of expressive conduct. The standard for determining whether a person's conduct that is intended to communicate merits First Amend-

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Society of Professional Engineers v. United States, 435 U.S. at 692-96; United States v. Socony-Vacuum Oil Co., 310 U.S. at 218-23; *see also* Michigan State Medical Society, 101 F.T.C. 191, 293 (1983).

ment protection was articulated in *United States v. O'Brien*, 391 U.S. at 377:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

We conclude, after applying this four-part test, that no immunity is justified in this case.

The federal antitrust laws easily satisfy the first three criteria. First, Congress is empowered to enact the Sherman Act and the Federal Trade Commission Act under its constitutional authority to regulate commerce.[136] Second, the governmental interest underlying these Acts, which is the protection of uninhibited competition, has long been accepted as important or substantial.[137] Third, the policy underlying the antitrust laws plainly is unrelated to the suppression of free expression.[138] Finally, application of the Federal

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[136] United States Constitution, Art. I, § 8, cl. 3. "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 (1978) (footnotes omitted).

[137] "The heart of our national economic policy long has been faith in the value of competition." Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

[138] The Sherman Act can be distinguished, for example, from a statute prohibiting "displays [of] any flag, badge, banner, or device . . . as a sign, symbol or emblem of opposition to organized government." Such a statute, which regulates conduct because the message communicated by the conduct is itself thought to be harmful, is unconstitutional. United States v. O'Brien, 391 U.S. at 382, *citing* Stromberg v. California, 283 U.S. 359 (1931).

Trade Commission Act to the respondents' conduct will not materially inhibit the respondents' right to free expression. The respondents can present their views and arguments to the District government in person, through others or through a varied campaign of publicity. We have weighed the strong government interest in prohibiting restrictions on competition, such as the respondents' coercive economic tactics, against any negligible inhibitions that application of the law here might impose on the respondents' freedom of expression. On balance, we conclude that any restriction this enforcement action might impose on the respondents' First Amendment freedoms is incidental at best and no greater than is essential to the furtherance of the government's interest in protecting competition. *See, e.g., National Society of Professional Engineers v. United States*, 435 U.S. at 696-99.

The respondents assert that, consistent with the reasoning in *Crown Central Petroleum Corp. v. Waldman*, 486 F. Supp. 759 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980), even boycotts to advance the participants' own economic interests are protected speech exempt from the antitrust laws under the *Noerr-Pennington* doctrine.[139] In *Crown Central*, a group of independent gasoline retailers agreed to close their service stations for three days for the purpose of influencing the U.S. Department of Energy to raise the existing gasoline price ceiling. The court held that the boycott was protected from the antitrust laws by the First Amendment as symbolic speech. On the same

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[139] R.A.B. at 29.

facts, the court in *Osborn v. Pennsylvania-Delaware Service Station Dealers Association*, 449 F. Supp. 553 (D. Del. 1980), concluded that "a boycott, along with its communicative component, has a coercive economic effect which ordinarily may be regulated without serious jeopardy to First Amendment interests." *Id.* at 557-58. The *Osborn* court's reasoning appears to be consistent with *O'Brien*, *Claiborne* and numerous other cases:

> [W]hen speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms so long as that interest "is unrelated to the suppression of free expression."

499 F. Supp. at 557, *citing United States v. O'Brien*, 391 U.S. at 376-77. Faced with the conflicting opinions in *Crown Central* and *Osborn*, we find that the analysis of the *Osborn* court is more consistent with precedent and is more persuasive.[140]

2. *Source of the anticompetitive restraint*

All of the cases we have addressed in the preceding section differ from the instant case in one important respect: in none of them was the government itself the economic – as opposed to the political – target of the boycott. In the case before us, the anticompetitive effects of the respondents' boycott resulted not from the

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[140] Professor Areeda agrees "more with the balance struck by *Osborn* than with that adopted by *Crown Central*." P. Areeda, *Antitrust Law* ¶ 205, at 34 (Supp. 1982). *See also* Note, *Commercial Entities and Political Boycotts: First Amendment Protections Versus Sherman Act Prohibitions*, 14 Conn. L. Rev. 391, 407-08 (1982).

independent action of the government but from the collective action of the CJA lawyers. The fact that anticompetitive restraints would be brought about by governmental rather than private action was the basis for a crucial distinction in *Noerr* and *Pennington* that is plainly absent here.

In *Noerr*, the Court said that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." 365 U.S. at 136, *citing Parker v. Brown*, 317 U.S. 341 (1943). The reason for this, according to the Court, is that "the question whether a law of that kind should pass . . . is the responsibility of the appropriate legislative or executive branch of government . . . ." 365 U.S. at 136. In *Pennington*, the union and certain mine operators jointly petitioned the Secretary of Labor to establish a minimum wage for coal miners and petitioned the TVA to limit coal purchases from mines exempt from the minimum wage standard. In denying relief, the Court observed that "the action taken to set a minimum wage for government purchases of coal" was the independent decision of a public official. 381 U.S. at 671.

In the usual case in which the *Noerr-Pennington* doctrine has been held to apply, the government has played the role of an independent decision maker who is not a participant in the market. Usually, the goal has been to persuade the government, for whatever reasons and in response to whatever political influences, to impose requirements causing competitive harm to the buyers, sellers or other players in a market operating in the economy at large. Here, the government is itself a player in the relevant line of commerce and has been coerced as a customer – indeed, the only customer – in

the market for CJA services. The fact that the government is involved is incidental to its role as a buyer in the marketplace.

The principle underlying the decision in *Noerr,* that immunity under the antitrust laws is contingent on a showing that the government imposed the restraint of trade, is the same principle that provides the basis for decision in those cases dealing with the "sham" exception to the *Noerr-Pennington* doctrine. In *California Motor Transport,* for example, the "sham" exception was held to apply because private rather than governmental action had restrained trade and because the normal channels of government had been disrupted by the private restraint of trade. 404 U.S. at 511-16.[141] The defendants in *California Motor Transport* allegedly acted to bar their competitors from access to adjudicatory tribunals and "so to usurp that decisionmaking process." *Id.* at 512. The alleged result was that the defendants, instead of government, "became 'the regulators of the grants of rights' " to the plaintiffs. *Id.* at 511.

Judge Needelman found, and we agree, that the boycott of the CJA program forced the District government to act to increase the CJA fees,[142] an action that the city previously, in its discretion, had declined to take. As sellers, the respondents acted in concert to compel their customer, the city, to pay a higher price. Unlike *Noerr* and *Pennington,* here the respondents by their boycott

[141] *See also* P. Areeda, *Antitrust Law* ¶ 203.1a, at 5 (Supp. 1982) (injury from "sham" activity results directly from antitrust defendant's activity, rather than from governmental action).

[142] I.D.F. 61 & 70.

successfully substituted their collective view of an appropriate price for that determined by the government. The restraint was *on* the government, not *by* the government.

3. *The government as victim*

The conduct in which the respondents have engaged would be unlawful where the victim of the boycott is not the government, and no policy reason supports an immunity from the antitrust laws simply because the government is the target. The denial of *Noerr* immunity here is consistent with the right of state and municipal governments to sue for treble damages to protect themselves from violations of the antitrust laws. *Georgia v. Evans,* 316 U.S. 159 (1942); *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906).[143] Professors Areeda and Turner have stated that the denial of immunity when government is the victim is consistent with the policy of the *Noerr* doctrine:

> The fact the government is the victim of an otherwise improper act by a private party cannot immunize the actor. Immunity would be inconsistent with the state and federal government's statutory right to damages for injuries resulting from antitrust violations. More fundamentally, immunity would lack any policy justification. . . . A concern for keeping government channels open and available to all, including this particular seller, is not relevant in this context and thus not ground for

[143] The United States may recover actual damages for antitrust violations. Section 4A of the Clayton Act, 15 U.S.C. § 15a.

permitting what would be condemned in dealing with any other buyer.[144]

The government was both victim and customer in *COMPACT v. Metropolitan Government of Nashville*, 594 F. Supp. 1567, 1572-83 (M.D. Tenn. 1984), *appeal pending*, where three black architectural firms joined together to "present a united front" for negotiating minority participation on selected construction projects. *Id.* at 1569. The three firms were allegedly the only black-owned architectural firms in the area and, until they formed COMPACT, had bid against one another for minority business set-aside shares on public contracts. The two projects initially targeted by the group were public projects. The court denied *Noerr* immunity to the architectural firms, on the ground that the Constitution does not protect "*commercial* activity by businessmen when dealing with government in its *proprietary* capacity." *Id.* at 1573. The court noted that the architects might have sought to achieve their goal of increasing minority participation by lobbying the state legislature or Congress. Instead, they chose to negotiate jointly with the government contractor. The court said, "COMPACT's actions were taken in the marketplace" and are not immune from the Sherman Act. *Id.*[145]

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[144] Areeda & Turner, *supra* note 128, ¶ 206b, at 53 (footnotes omitted); *see also* Note, *Application of the Sherman Act to Attempts To Influence Government Action*, 81 Harv. L. Rev. 847, 848 (1968) ("no substantial reasons to distinguish attempts to influence private commercial conduct, to which the antitrust laws clearly apply, from efforts to influence the government in its role as a customer").

[145] *See also* City of Atlanta v. Ashland-Warren, Inc., 1982-1 Trade Cas. (CCH) ¶ 64,527, at 72,928 (N.D. Ga. 1981) (nature of conduct and role of government are factors in determining applicability of *Noerr*).

Some courts have declined to grant *Noerr* immunity to private parties when they deal with government acting in a commercial capacity instead of in its policy-making role. *E.g., Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). Two courts have granted *Noerr* immunity where the government was a participant in the market, but in neither case was the government the victim of private restraints. *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1985); *In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983). We would reach the same result in these two cases under the analytical framework we have used in this opinion – that is, we would find that the *Noerr-Pennington* doctrine applies. Both cases involved challenges to restrictive airport concession granted by municipalities to private parties. In each case, the restraint on competition emanated from the government, not from private action. In addition, the allegedly unlawful conduct appears to be petitioning of government, not coercion of government. The court's conclusion in *Airport Car Rental* that "the nature of the government activity is one factor in determining the type of public input acceptable to the particular decision-making process," 693 F.2d at 88, is consistent with our own.

In the instant case, the city was the purchaser of CJA services. The government, like any other buyer, has an interest in obtaining the requisite supply at a competitive price. Here, the District government effectively expressed this interest by repeatedly declining, on

budgetary grounds, to increase the CJA fees. Like any other customer subject to a price-fixing conspiracy, the government, during the respondents' boycott, was unable to obtain a competitive price. Permitting a price-fixing boycott directed at the government as buyer does not foster the *Noerr* goal of free exchange of information between people and the government. At the same time, prohibiting such conduct does not interfere with anyone's ability to choose to sell his services to the government or to make his views on the appropriate price known to the government.

We hold that the respondents are not immune from liability under the *Noerr-Pennington* doctrine. The CJA lawyers are a group of sellers who, when unable to obtain a satisfactory price for their services through non-coercive efforts to persuade the government, elected to participate in an explicit price-fixing boycott. The mere fact that the government, as the only purchaser of CJA services, was the target does not protect their boycott from regulation. An order prohibiting the respondents from engaging in a price-fixing boycott of the city's CJA program will protect the governmental interest in free competition and will not adversely affect the respondents' ability to exercise their First Amendment right to petition the government.

III. THE ORDER

We have concluded that the concerted refusal to deal by SCTLA and the individual respondents for the purpose of increasing the CJA fees constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. Having found a violation of the Act, the Commission is empowered to enter an appropriate order to prevent a recurrence of the

violation. The order must, of course, be reasonably related to the violation found to exist. *See, e.g., F.T.C. v. National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608 (1946).

The order in this case narrowly prohibits the respondents from engaging in the conduct that we have concluded was unlawful and recognizes their right under the First Amendment to petition the government. The order requires the respondents to cease and desist from concerted refusals to provide legal representation to any government program that provides such services for indigent criminal defendants in connection with efforts to affect the level of fees paid for such representation. Paragraphs, I.B, I.C and I.D of the order require the respondents to cease and desist from certain specific practices that they employed to ensure the success of their boycott. These provisions are clearly related to the law violation found to exist and no broader than necessary to prevent a recurrence of the violation.

Paragraph I of the order specifically provides that nothing in the order shall prevent the respondents from exercising their rights under the First Amendment to petition the government concerning any legislation, rules or procedures. Although in our view, the cease and desist provisions of the order are sufficiently narrow that they do not inhibit the respondents' constitutional right to petition, we include this proviso in the interest of clarity. *See National Society of Professional Engineers v. United States*, 435 U.S. at 697-98 & note 27.

Paragraph II of the order provides that notice of the order be given to the members and officers of the Superior Court Trial Lawyers Association. For the purpose of notifying CJA lawyers who may not have

budgetary grounds, to increase the CJA fees. Like any other customer subject to a price-fixing conspiracy, the government, during the respondents' boycott, was unable to obtain a competitive price. Permitting a price-fixing boycott directed at the government as buyer does not foster the *Noerr* goal of free exchange of information between people and the government. At the same time, prohibiting such conduct does not interfere with anyone's ability to choose to sell his services to the government or to make his views on the appropriate price known to the government.

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registered their addresses with the SCTLA, the order requires that a copy be posted for a limited time in the same place that SCTLA notices are customarily posted. Paragraphs III, IV and V set forth the respondents' compliance obligations under the order. These provisions are designed to assist the Commission in monitoring compliance with the order and they impose only a minimal burden on the respondents.

The respondents claim, without citing authority for the proposition, that an order should not issue against SCTLA because it is not an "association" within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44.[146] The law provides that an unincorporated voluntary association is subject to the Commission's jurisdiction. *See National Harness Manufacturers' Association v. FTC,* 268 F. 705, 708-09 (6th Cir. 1920); *see also United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344, 383-92 (1922). The record shows as a matter of fact that the SCTLA is an association. *See, e.g., Ripon Society v. National Republican Party,* 525 F.2d 567, 571 n.5 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 933 (1976); *Georgia v. National Democratic Party,* 447 F.2d 1271, 1273 n.2 (D.C. Cir.), *cert. denied,* 404 U.S. 858 (1971).

Although the SCTLA is a loosely knit organization, the Association has officers, holds meetings, collects dues, maintains a bank account and helps to promote the pecuniary and other interests of its members, CJA lawyers.[147] At a minimum, the SCTLA provided a "rallying point"[148] for the 1983 boycott. The officers of SCTLA presented themselves and were perceived as

[146] R.A.B. at 55-56.

[147] I.D.F. 1-4.

[148] I.D.F. 1.

spokesmen for the SCTLA lawyers. The vote to strike if the fees were not increased and the vote to resume work if the city increased the CJA fee to $35 were taken at SCTLA meetings, presided over by SCTLA officers. The Association was integrally involved in the boycott. Although the structure of the SCTLA may vary over time, it has been in existence for at least ten years,[149] and there is no reason to conclude that the SCTLA will not continue to be active as an organization for the interests of the CJA lawyers. We conclude that the SCTLA is an association within the meaning of the Act and that it is appropriate to name the SCTLA in the order.

The respondents also claim that an order against the SCTLA would "pose serious due process problems of notice,"[150] because CJA lawyers have no way of knowing whether they are members of the SCTLA or whether they may be held responsible for the acts of others on behalf of the Association. The order, however, does not impose liability merely for the use of SCTLA facilities or for knowledge of the unlawful conduct of another.[151] The respondents would violate the order only if they themselves engaged in concerted action prohibited by the order or if they authorized an agent to engage in such conduct on their behalf. The Association now exists, and it has officers and members. The Commission is empowered to issue an order requiring the respondents to cease and desist from their unlawful conduct, and the order provides for notice to them. We perceive no problem of lack of notice in those provisions.

[149] I.D.F. 2.

[150] R.A.B. at 56.

[151] *Id.*

An order is appropriate to prevent a recurrence of the violation. The SCTLA, its members and the individual respondents were active participants in and organizers of the strike. At the time of the hearing, Mr. Perrotta, Ms. Koskoff, and Mr. Addison were officers of the SCTLA. Although Ms. Slaight, the chairperson of the SCTLA strike committee, left CJA practice after the boycott and entered private employment away from Washington, she has since returned to the District and is once again accepting cases under the CJA.

The circumstances that gave rise to the SCTLA lawyers' demands for increased CJA compensation levels have not changed substantially. The record demonstrates that some of the respondents and other CJA lawyers believe that CJA rates are still too low.[152] The Federal CJA fees, as amended in 1984, are now higher than the District's CJA fees. Although legislation has been introduced in the City Council to raise the CJA fees to the levels first demanded by the SCTLA lawyers, the legislation has not been enacted. The CJA lawyers boycotted the CJA program twice before the 1983 boycott.[153] One of the boycotts, like that in 1983, was for the purpose of increasing fees. The other boycott was sparked by complaints that judges were mistreating CJA lawyers, but economic issues emerged as well.[154] The entry of an order is appropriate to prohibit the respondents from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process.

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[152] I.D.F. 65; JX 10, at 80; JX 13, at 128; CX 43B.

[153] JX 6, at 61; O'Neill Tr. 557.

[154] Perrotta Tr. 672; JX 11, at 112-115. The record does not tell us anything more about the previous boycotts.

The respondents object also to the entry of paragraph IV of the order, requiring the individual respondents to notify the Commission, for a period of five years, of any change in their law practice. According to the respondents, this provision is "pure harassment" and "serves no legitimate purpose."[155] We disagree. The order prohibits concerted action to raise the fees paid by governments under programs to provide counsel to indigent criminal defendants. Because the level of fees for such legal services in other jurisdictions is similar to or lower than the fees in the District of Columbia, the individual respondents may have a financial incentive to engage in similar conduct in other locales. For example, the fees under the federal Criminal Justice Act continued to be $20 to $30 per hour for one year after the SCTLA lawyers had succeeded in raising the District's fee to $35 an hour. In 1983, the fees in Maryland were $20 and $25. The fees in New York, where Ms. Slaight lived for several years after the boycott, were $15 and $25. The maximum in Virginia for a felony case was $400, less than half of the District's $1000 fee.[156] We conclude that this provision of the order also is reasonably related to the violation in this case and appropriate to prevent a recurrence of the violation.

The respondents have demonstrated no recognition that a price-fixing boycott is an unlawful means by which to seek increased reimbursement rates from the government. *SEC v. Savoy Industries, Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978), *cert. denied*, 400 U.S. 913

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[155] R.A.B. at 59.

[156] CX 38J. This exhibit, showing a state-by-state breakdown of fees for indigent criminal cases, is reprinted in Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 98th Cong., 1st Sess. 240-41 (1983).

(1979). Under these circumstances, there is a cognizable risk that the unlawful conduct will be repeated by these respondents absent an order to cease and desist. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1945).

CONCLUSION

The respondents disrupted the criminal justice system in the District of Columbia and coerced the District government into raising the fees paid to them under the Criminal Justice Act. This coercive, concerted refusal to provide legal services to the District government unless and until the fees for those services were raised constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. The Administrative Law Judge concluded that the disruption of the criminal justice system and the additional cost to the city for the CJA program were not "adverse effects," because the District government assertedly supported an increase in CJA fees. We find neither legal nor factual support for this conclusion. Accordingly, we reverse the Administrative Law Judge's decision and issue the attached order against SCTLA and the individual respondents.

ISSUED: JUNE 23, 1986

[INITIAL DECISION]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 9171

IN THE MATTER OF

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
AN ASSOCIATION,
RALPH J. PERROTTA
KAREN E. KOSKOFF, AND
REGINALD ADDISON,

AS PRIVATE LAW PRACTITIONERS AND AS OFFICERS OF
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, AND

JOANNE D. SLAIGHT, PRIVATE LAW PRACTITIONER.

Filed: October 18, 1984

INITIAL DECISION

By Morton Needelman, Administrative Law Judge

Karen G. Bokat, Jonathan J. Groner, Mary Anne M. Fox, and M. Suzanne Miller, Counsel Supporting the Complaint.

Sutherland, Asbill & Brennan
Washington, D.C.
By Willis B. Snell, Michael L. Denger, and Willard K. Tom, Counsel for Respondents.

I

STATEMENT OF THE CASE

Most of the criminal defendants brought before the District of Columbia's Superior Court[1] are indigents represented by private lawyers appointed by the commissioners and judges of the Superior Court under the District's Criminal Justice Act ("CJA"). The fees paid to these "CJA lawyers" [2] had been set in 1970 at $20 for out-of-court time and $30 for in-court time. This case centers around a 1983 boycott organized by the Superior Court Trial Lawyers Association ("SCTLA"), a confederation of CJA lawyers, to obtain higher fees.

[1] Since 1970, Superior Court has been the principal trial forum for criminal offenses involving violations of the D.C. Code. Criminal cases in Superior Court are heard in two divisions – Criminal Division for adults, Family Division for juveniles under age 18. The United States District Court for the District of Columbia has concurrent jurisdiction with Superior Court for any violation of the D.C. Code which is also a federal offense. In actual practice, fully 95 percent of all criminal cases brought in the District are heard in Superior Court. See Carter 124-126, 220, 221.

[2] The CJA lawyers are sometimes referred to as "Fifth Streeters" (for where Judiciary Square, Superior Court, and the offices of some CJA old-timers are located) as a way of distinguishing them from Washington's "uptown lawyers" who practice in the federal court system, before federal departments and administrative agencies, and on the civil side of Superior Court. While the offices of the uptown bar are usually located on the streets leading off Connecticut Avenue, the geographical separation between the two bars is gradually diminishing as a result of the gentrification of the area between 15th and 5th Streets. Notwithstanding the blurring of territorial lines, the separation of Washington lawyers between Fifth Streeters and the uptown bar is well-recognized and embraces every aspect of their respective practices: kinds of clients, types of cases, prestige, income, amenities, and the forums where they generally appear. The CJA bar must also be distinguished from the handful of District lawyers who represent the big-time criminal defendants – those in control of prostitution, gambling, and drugs and who can well afford to pay generously for skilled counsel. See Perrotta 647-649. See also JX 2, p. 51, JX 4, p. 21, JX 6, p. 71, JX 11, p. 133; RX's 647-649.

The Commission's complaint, which was filed on December 16, 1983, charges that the members of SCTLA and three named officers of the association (respondents Perrotta, Koskoff[3] and Addison), as well as respondent Joanne D. Slaight as head of a so-called "Strike Committee", entered into an agreement among themselves and with other CJA lawyers to restrain trade by refusing to compete for or to accept new appointments unless fees were raised. In support of this charge, the complaint cites the following petition attributed to SCTLA:

> We, the undersigned criminal lawyers in the District of Columbia Superior Court, agree that unless we are granted substantial increases in our hourly rate, we will cease accepting new appointments under the Criminal Justice Act.

The subsequent refusal by the members of SCTLA and the named individual respondents to take additional appointments, as well as the alleged harassment aimed at inducing other attorneys to refuse appointments, is variously characterized in the complaint as an illegal agreement, a combination, and a conspiracy to fix prices and to conduct a boycott. According to the complaint, but for the boycott, the CJA lawyers would have competed among themselves in deciding independently whether to accept CJA cases at fees offered by the District. The effects of the boycott are said to include a

[3] By my order dated August 15, 1984, the pertinent part of the caption of the case was changed to "Karen E. Koskoff" from the original "Karen E. Dixkoskoff" to reflect a legal name change.

restraint on competition for CJA appointments, the disruption of the District's criminal justice system, and the imposition by duress of additional costs on the District.

Respondents' answer, dated January 6, 1984, acknowledges that respondents Slaight and Addison signed the aforementioned petition but otherwise denies all material allegations in the complaint. The answer also states that SCTLA is not a legally accountable or even an identifiable organization for purposes of a Federal Trade Commission proceeding. The answer asserts as affirmative defenses that respondents' activity represented the exercise of the right to petition guaranteed by the First Amendment, and was undertaken in furtherance of the Sixth Amendment rights of indigent criminal defendants.

In the prehearing stage both sides were allowed discovery including depositions of all prospective witnesses and several key participants in the boycott who were not subsequently called as witnesses. Complaint counsel's case-in-chief was heard during the week of May 7, 1984. The defense case was presented between May 13, 1984, and May 25, 1984. Rebuttal exhibits were offered by complaint counsel on June 8, 1984, and the record was closed for the receipt of evidence on July 20, 1984. During the hearings, counsel for both sides were given full opportunity to be heard and to cross-examine the witnesses. The parties filed their main briefs and proposed findings on August 14, 1984. Reply briefs were filed on September 4, 1984.

After reviewing all the evidence as well as proposed findings and briefs submitted by the parties, and based on the entire record, including my observation of the

demeanor of witnesses, I make the following findings of fact:[4]

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[4] Proposed findings not adopted in the form or substance proposed are rejected, as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

CX (Complaint counsel's exhibits)
RX (Respondents' exhibits)
JX (Joint exhibits)

Testimony is cited by the name of the witness, followed by transcript page as in Isbell 1357. Complaint counsel's Exhibit 1 and respondents' Exhibit 1 are the indices required by Section 3.46(b) of the Commission's Rules.

The appearances of the witnesses were as follows:

Name	Called By	Tr. Pages
Francis D. Carter (Director, Public Defender Service)	Complaint counsel ("c.c.")	67-290
Herbert C. Robinson (Chief of Staff, Criminal Justice Act Office, Public Defender Service)	c.c.	311-384
Lillian A. McEwen (CJA Lawyer)	c.c.	407-517
Hugh O'Neill (CJA Lawyer)	c.c.	525-574
Ralph J. Perrotta (CJA Lawyer, former SCTLA President and now Chairman of SCTLA Board of Directors)	Respondents ("resp.")	634-784
Karen E. Koskoff (CJA Lawyer, former SCTLA Vice-President, and now SCTLA President)	resp.	784-866

(footnote continued)

Reginald. G. Addison (CJA Lawyer, former SCTLA Secretary and now SCTLA Vice-President)	resp.	872-911
Nelson J. Kline (Former CJA Lawyer and Media Representative for the "Strike Committee")	resp.	916-948
Joanne D. Slaight (Former CJA Lawyer and Chairperson of the "Strike Committee")	resp.	949-975
Robert H. Salisbury (Professor of Political Science; Washington University, St. Louis, Missouri)	resp.	979-1047
John H. Pickering (Former President, D.C. Bar (Unified))	resp.	1051-1109
Edward P. Colbert (Uptown Lawyer)	resp.	1109-1124
Geoffrey C. Hazard, Jr. (Professor of Law, Yale Law School, and Director, American Law Institute)	resp.	1128-1173
James F. Rill (Uptown Lawyer)	resp.	1177-1190
Edward J. Lopata (Uptown Lawyer)	resp.	1191-1206
Sterling Tucker (Former Chairman, D.C. City Council)	resp.	1236-1283
James R. Loftis, III (Uptown Lawyer)	resp.	1283-1295
David B. Isbell (President, D.C. Bar (Unified))	resp.	1302-1369

(footnote continued)

Wiley A. Branton (Former Dean, Howard University Law School)	resp.	1370-1413
Norman Lefstein (Professor of Law, University of North Carolina Law School)	resp.	1418-1540

Deposition testimony appears in the following joint exhibits:

JX's 2-4 – J. Gerard Lewis (CJA lawyer and SCTLA Treasurer)

JX 5 – Cheryl B. Stein (CJA lawyer and member of the "Strike Committee")

JX 6 – David B. Hirsch (CJA lawyer and member of the "Strike Committee")

JX 7 – Robert J. Pleshew (CJA lawyer and former member of SCTLA Board of Directors)

JX 8 – Roger L. Pickens (CJA lawyer and member of the "Strike Committee")

JX 9 – Yvonne T. Foster (CJA lawyer and former SCTLA Secretary)

JX 10 – Joanne D. Slaight (See above)

JX 11 – Ralph J. Perrotta (See above)

JX 12 – Reginald G. Addison (See above)

JX 13 – Karen E. Koskoff (See above)

Deposition testimony is cited by reference to the joint exhibits listed above, followed by page number.

II

FINDINGS OF FACT

A. *SCTLA*

1. Respondent Superior Court Trial Lawyers Association ("SCTLA"), a loosely-organized unincorporated association, served as the rallying point for the 1983 campaign waged by the CJA lawyers to increase their fees. (Findings 2 to 4.)

2. SCTLA has been in existence for at least 10 years.[5] It is located in Room 1220, Superior Court Building, 500 Indiana Avenue, N.W., Washington, D.C. 20001.[6] At one point, SCTLA had some of the formal trappings of a professional organization – i.e., a certificate of incorporation as a District of Columbia nonprofit corporation, by-laws, and a Blue Cross/Blue Shield insurance policy.[7] The certificate of incorporation was revoked on September 14, 1981; in early 1983 it was decertified for health insurance purposes because it did not meet Blue Cross/Blue Shield criteria for an employer/employee group; and if SCTLA now has by-laws no one seems to know where they are or what they say.[8]

3. Because lawyers are constantly entering and leaving CJA practice, the membership of SCTLA is difficult to pin down. There is no reliable membership list.[9] Technically, membership in the organization and the right to vote in SCTLA elections is open to any lawyer who takes CJA cases and pays the $30 annual dues.[10] But income from CJA practice being what it is, there is a minimum level of compliance with the dues requirement, and SCTLA officers (CJA practitioners themselves who appreciate the financial condition of their colleagues) have never vigorously enforced the dues requirement or strictly limited voting in SCTLA elections to dues-paying members.[11] As a result, any CJA lawyer (broadly identified as someone who takes CJA cases) can participate in SCTLA meetings, vote in SCTLA elections, and even hold office in the organization.[12]

4. Despite its diminished status as a formal association, SCTLA nevertheless functions as a viable entity around which the CJA lawyers are organized. SCTLA holds informal meetings from time to time in the Lawyers' Lounge of the courthouse.[13] It has a board of directors and it elects officers.[14] It maintains a bank account.[15] At one time, it organized a Political Action Committee (PAC), which collected funds and made con-

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[5] JX 11, p. 23; CX 2A.

[6] CX 6A.

[7] JX 2, pp. 21, 24, 25, JX 11, p. 17, JX 13, pp. 20, 21, 124; CX 2B, C.

[8] JX 2, p. 23, JX 3, p. 212, JX 6, p. 65, JX 11, p. 17; CX 2D.

[9] JX 2, pp. 14-17, JX 9, pp. 16, 17; CX 1634A-I, which purports to be an SCTLA membership application list, contains the names of individuals who are not in CJA practice. JX 7, p. 52, JX 9, p. 54.

[10] JX 2, p. 20, JX 7, pp. 14, 47, 50, JX 9, p. 17, JX 13, pp. 176, 190.

[11] JX 2, pp. 15, 16, JX 3, p. 208, JX 6, pp. 8, 9, JX 9, pp. 11, 12, 17, JX 11, p. 21.

[12] JX 2, p. 8, JX 5, p. 19, JX 6, pp. 8, 11, JX 7, pp. 7-13, JX 12, pp. 28, 46-48; Addison 892.

[13] Meetings (including election meetings) are held on the spur-of-the-moment or whenever someone posts a notice on the blackboard in the Lawyers' Lounge of Superior Court announcing that one is necessary. JX 2 p. 58, JX 6, pp. 55, 56, JX 7, p. 9, JX 13, p. 37.

[14] JX 2, p. 8, JX 3, pp. 138, 139, JX 7, pp. 12-14, 17, JX 9, pp. 8, 10, 11, 13, 43-45, JX 11, p. 20, JX 12, p. 22, JX 13, p. 21.

[15] JX 2, pp. 8, 19, 59, 60, JX 3, p. 200; CX 56.

tributions to political candidates supportive of SCTLA's demand for a rate increase.[16] SCTLA officers initiated, and the SCTLA treasury paid, the expenses associated with a pre-boycott lobbying campaign aimed at increasing CJA rates.[17] SCTLA officers orchestrated the boycott and SCTLA paid boycott-related expenses.[18] In general, SCTLA holds itself out as the representative of CJA lawyers, and in that capacity its leaders are perceived as authorized to speak for CJA lawyers on the question of rates and other matters affecting CJA practice.[19]

B. ***Individual Respondents***

5. Respondent Ralph J. Perrotta graduated from the Harvard Law School in 1960, and was admitted to practice in the District of Columbia the same year. Between 1960 and 1979, Perrotta pursued a varied career with emphasis on public interest work: he drafted Medicaid and child abuse legislation; he established antipoverty, head start, legal services, and neighborhood health programs; and he worked with organizations concerned with the problems of urban ethnic groups. Perrotta also taught courses on urban affairs at the Rhode Island School of Design and Cornell University. In 1976, he ran unsuccessfully for the Democratic nomination for United States Senator from Rhode Island. Perrotta en-

[16] JX 10, p. 14, JX 11, pp. 23, 24; Perrotta 679.

[17] JX 2, pp. 25-27, JX 11, pp. 97, 98; Perrotta 679, 693, 694, 698, 699.

[18] See Findings 46-49, 55, 58, 63, 65, 66.

[19] JX 2, pp. 46-53, JX 7, pp. 16, 20, JX 11, pp. 60, 98, JX 12, pp. 21, 24, 26; CX's 6A-14, 36C, 38F, 84A; RX's 63B, 142B-D; Perotta 678-680, Koskoff 849, 850, Pickering 1090, 1091. See also Findings 37-40, 42-45, 50, 55, 58, 63, 65, 66.

tered CJA practice in 1979 when he found that public interest funding was drying up and that career opportunities in this area were no longer readily available.[20] At present, about 90 percent of Perrotta's practice consists of CJA cases.[21] He conducts his practice from his home and he has no employees.[22] In the fall of 1982, Perrotta was elected President of SCTLA and in October, 1983, he was elected Chairman of the Board of SCTLA.[23]

6. Respondent Karen E. Koskoff graduated from Antioch Law School in 1979 and was admitted to practice in the District of Columbia in 1980. She is a sole practitioner who has accepted CJA cases since early 1981. Her interest in criminal and poverty law traces back to her high school days when she served as a part-time staff member in a drug treatment program. In college she assisted released prisoners in finding jobs. Koskoff has worked as an investigator for the public defender service in Montpelier, Vermont, and as a social worker in a work release program for prisoners in Madison County, Alabama. While attending Antioch Law School, she participated in the school's Prisoners' Rights Clinic, Adult Misdemeanor Clinic, and Juvenile Clinic. In her third year at Antioch, Koskoff was certified to handle misdemeanor cases in Superior Court in the District. After graduation from law school, she was employed as a staff attorney with the Public Defender Service in Pittsburgh, Pennsylvania and worked briefly with a Washington, D.C. law firm. Koskoff began tak-

[20] Perrotta 635-641.

[21] Perrotta 647.

[22] JX 11, p. 9; Perrotta 646, 647.

[23] JX 11, p. 19; Perrotta 663, 762, 763.

ing CJA assignments in 1981.[24] At present, approximately 99 percent of her practice consists of CJA cases.[25] She conducts her practice from her home and has no employees.[26] In late 1982, Koskoff was elected Vice-President of SCTLA and in October, 1983, she was elected President of SCTLA.[27]

7. Respondent Reginald G. Addison graduated from George Washington University Law School in 1981 and was admitted to practice in the District of Columbia the same year. He grew up in Southeast Washington, "had a couple of brushes with the law" [28] as a juvenile, and went into CJA practice determined to help those from a similar background.[29] He is a sole practitioner who has accepted CJA cases since February, 1982. Approximately 90 percent of Addison's current practice consists of CJA cases. He maintains an answering service in a part-time office that also serves as his mailing address. He has no employees.[30] In the summer of 1983, Addison was elected Secretary of SCTLA and in October, 1983, he was elected Vice-President of SCTLA.[31]

8. Respondent Joanne D. Slaight graduated from Catholic University Law School in 1980 and was admitted to practice in the District of Columbia the same year. Before entering law school, she was employed in public interest work in California and New York.[32] She

[24] Koskoff 785-792.

[25] JX 13, p. 47; Koskoff 792, 793.

[26] Koskoff 793.

[27] JX 13, p. 19; Koskoff 785, 793, 794.

[28] Addison 874.

[29] Addison 873-875.

[30] JX 12, pp. 7, 9, 10; Addison 873-875.

[31] JX 9, p. 13, JX 12, p. 20.

[32] Slaight 950.

began taking CJA assignments in 1981, and at the time of the boycott, approximately 95 percent of Slaight's practice consisted of CJA cases. Until December, 1983, she maintained an office in the District of Columbia. She had no employees.[33] She has never been elected as an officer or director of SCTLA and did not pay dues to SCTLA in 1983.[34] In August, 1983, Slaight was designated as Chairperson of a "Strike Committee", which later evolved into the "SCTLA Strike Committee." [35] In December, 1983, she stopped handling CJA cases in the District of Columbia and now lives in Staten Island, New York. Slaight is presently employed by The New York Public Interest Research Group, Inc.[36]

C. *The Criminal Indigency Problem In The District Of Columbia*

9. The Sixth Amendment of the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[33] JX 10, p. 7; Slaight 951, 952, 954.

[34] JX 10, p. 12; Slaight 973.

[35] JX 10, pp. 32, 33; Slaight 973. See also Findings 47, 58.

[36] Slaight 950.

10. The Supreme Court has held that the Sixth Amendment right of the accused to be represented by counsel is essential because lawyers are the means through which all other rights are secured.[37] In *Powell* v. *Alabama,* the Court said that the right of fair trial itself would be meaningless without counsel. . .

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[38]

11. The Court has also held that the Sixth Amendment guarantees more than just the right to retain a lawyer or to have one appointed. By its terms, the accused has a right to "the Assistance of Counsel for his defense," and "Assistance" in the context of our adver-

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[37] *United States* v. *Cronic,* 52 U.S.L.W. 4560 (May 14, 1984); *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Johnson* v. *Zerbst,* 304 U.S. 458 (1938); *Powell* v. *Alabama,* 287 U.S. 45 (1932).

[38] 287 U.S. 45 at 68-69 (1932).

sary system means that the criminal defendant should have by his side a vigorous and effective advocate who at every turn requires "the prosecution's case to survive the crucible of meaningful adversial testing." [39]

12. The constitutional guarantee of effective counsel applies to all criminal defendants, rich and poor alike. In *Gideon* v. *Wainwright,* the Court said:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[40]

13. Following *Gideon,* the right of the indigent accused to counsel has been extended to misdemeanor cases in which the accused may suffer a loss of liberty, and to the crucial preliminary proceedings in a criminal proceeding that can determine the outcome of the trial.[41]

14. Notwithstanding the "noble ideal" of the Sixth Amendment celebrated in cases both before and after *Gideon,* the real world differences between the quality of "Assistance" available to the affluent as compared to

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[39] *United States* v. *Cronic,* 52 U.S.L.W. 4560 at 4562 (May 14, 1984). *See also Strickland* v. *Washington,* 52 U.S.L.W. 4565 (May 14, 1984).

[40] 372 U.S. 335 at 344 (1963).

[41] *United States* v. *Gouveia,* 52 U.S.L.W. 4659 (May 29, 1984); *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972).

the needy[42] persists for several reasons. To begin with, there is the sheer dimensions of the criminal indigency problem facing an urban jurisdiction like the District. About 85 percent of the persons charged with criminal offenses in the District are eligible for court-appointed counsel.[43] This translates into approximately 25,000 indigency cases closed in 1982 by court-appointed counsel,[44] and the addition of new "papered" [45] indigency cases at the rate of 50 to 80 a day.[46] Further compounding the District's problem is a line of legal authority creating a substantive right to quality representation for the indigent accused at the very time when criminal law itself has been imbued with a host of complex procedural problems requiring an increasingly high level of legal skill.[47]

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[42] See, *e.g., Strickland* v. *Washington*, 52 U.S.L.W. 4565 at 4576 (dissenting opinion of Mr. Justice Marshall) (May 14, 1984) ("It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure that he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case".).

[43] Carter 88, 126, 127, Robinson 326.

[44] RX 14S; Carter 154.

[45] A "papered" case is one in which formal charges are filed by the United States Attorney who prosecutes all criminal offenses in the District. If a case is "no papered" (i.e., no charge is filed) the accused is released. The decision to "no paper" a case is usually, but not always, made early in the day before court-appointed counsel has been assigned. Carter 76, 128.

[46] CX 233E; RX 158E.

[47] Hazard 1139-1142.

D. *The District's Answer To The Criminal Indigency Problem*

15. The District's answer to its criminal indigency problem is a mixed system consisting of both private lawyers compensated under the Criminal Justice Act (CJA lawyers) and government lawyers employed by the District's Public Defender Service (PDS). (Findings 16 to 19.)

16. At the center of the District's mixed system is the Public Defender Service (PDS), which not only constitutes one of the two operating arms of the mixed system, but also contains within its table of organization the Criminal Justice Act Office (CJA Office of PDS), the administrative office with responsibility for the other component of the mixed system – the private practitioners (CJA lawyers) compensated under the District's Criminal Justice Act (D.C. CJA).[48]

17. The PDS component of the mixed system was established by Congress in 1970 as the successor to the Legal Aid Agency. PDS lawyers are full-time employees of the District of Columbia.[49] By statute, PDS may represent only criminal defendants charged with an offense punishable by imprisonment for six months or more, and it may represent no more than 60 percent of the indigents in this overall category.[50] In fiscal 1982, PDS was authorized 110 employees. Of its total complement of 56 attorneys, three supervisors and 38 attorneys are assigned to indigency cases in the Criminal Division of Superior Court.[51]

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[48] Carter 67-69, Robinson 312-314.

[49] Carter 69.

[50] D.C. Code § 1-2702(a)(1); Carter 158.

[51] Carter 138, 139.

18. The CJA lawyers component of the mixed system is open to every member in good standing of the D.C. bar having a local address and a local telephone number. To become eligible to receive appointments under the D.C. CJA, all that a private attorney has to do is register with PDS' CJA Office.[52] Although there are more than 1,200 private attorneys on the master list of attorneys registered with the CJA Office, most appointments go to the approximately 100 lawyers[53] (the CJA "regulars") who derive almost all of their income from representing indigents,[54] and make themselves available to take appointments on a regular basis.

19. The two branches of the District's mixed system differ sharply in the role each performs in the criminal justice system. Criminal offenses under the D.C. Code are classified as misdemeanors, felony I's, and felony II's.[55] Most of the cases requiring court-appointed lawyers (20,000 of the 25,000 indigency cases closed in

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[52] Robinson 354.

[53] Estimates of the size of the corps of CJA regulars vary widely in the record (ranging from 50 to 200), and the approximation indicated in the text merely reflects the figure mentioned most often. See, e.g., JX 2, p. 84, JX 3, p. 155, JX 12, p. 112, JX 13, pp. 47, 48; CX's 38G, 76D, 80A; Robinson 323-326, 379.

[54] Because of the nature of CJA practice – its long hours away from the office (assuming the CJA lawyer has an office), the deadlines of Superior Court, and the problem of meeting deadlines in other courts – CJA regulars ordinarily do not take civil cases, nor do they usually appear on the criminal side of U.S. District Court. JX 2, pp. 80-82.

[55] Felony I's are the more serious crimes – homicide, rape, and armed robbery – carrying a maximum sentence of fifteen years. Felony II's are crimes such as burglary and larceny subject to a maximum prison term of fifteen years. Misdemeanors are punishable by imprisonment for no more than one year. Carter 78.

fiscal 1982) are misdemeanors,[56] and clearly it is the CJA lawyers who have assumed the responsibility of moving this large volume of lesser crimes – 19,475 misdemeanors in fiscal 1982[57] – through the criminal justice system. About 80 percent of the cases handled by CJA lawyers are misdemeanors. The CJA lawyers also handled some 4,000 felonies in fiscal 1982 but these were mainly felony II's.[58] In all, the CJA lawyers are responsible for fully 85 percent of all the indigency cases.[59] PDS, in contrast, appears in only about 8 to 10 percent of the criminal indigency cases.[60] This relatively small percentage, however, represents most of the more complex felony I's, including two-thirds of all murder cases.[61] In short, the CJA lawyers handle most of the volume; PDS, on the other hand, operates on the basis of a limited caseload heavily skewed toward the more difficult felony I cases.[62] The District is unique among major urban jurisdictions in its reliance on assigned private lawyers to handle such a large percentage of its huge indigency caseload.[63] In 1982, payments made to CJA lawyers by the District amounted to $4,579,572. The PDS appropriation was $3,306,000.[64]

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[56] RX 14S; Carter 154, 155.

[57] RX 14S; Carter 153, 154.

[58] RX 14S; Carter 154, 156-158, Perrotta 642, 643.

[59] RX 14S.

[60] RX's 5I, 16C; Carter 149, 156. PDS caseloads are far below the statutory limit of 60 percent (see Finding 17) of the kinds of cases it is permitted to take. RX 4E; Carter 81.

[61] RX's 4G, 5I; Carter 82.

[62] Carter 81. More than 65 percent of the PDS cases are felonies (Carter 81), and of the PDS felony caseload, 75 to 80 percent are felony I's. RX 14R.

[63] CX 38K; Hazard 1172.

[64] RX's 4Z-8, 22M.

20. In addition to the CJA lawyers and the PDS components of the District's mixed system, indigent criminal defendants are also represented from time to time by private attorneys who take assignments on an uncompensated pro bono basis. Less than one-half of one percent of the eligible indigent defendants are represented by these pro bono attorneys.[65] Third-year law students from Howard, Georgetown, American, Antioch, Catholic, and George Washington University Law Schools who are participating in clinical programs are permitted by Superior Court rules to handle misdemeanor cases under the guidance of a supervising attorney. These uncompensated students handle approximately three to five percent of indigent criminal cases.[66]

21. The record shows that there are alternatives to the District's mixed system, but no single solution has been a panacea, and the effectiveness of any system is largely a function of the level of public funds made available for indigency representation.[67] Voluntary pro bono, which obviously requires no public funding, may be feasible in a jurisdiction having a relatively small number of indigency cases, but there is no evidence that any voluntary system has operated effectively in the context of the massive criminal indigency problem associated with an urban inner city.[68] Another possible option (also requiring no public funds) is the use of compulsory pro bono – that is, a rule imposed by court, unified bar, or legislature, requiring all lawyers to serve an uncompensated turn as assigned counsel. Such a system has been criticized on several grounds: the lack of ex-

[65] Robinson 327.

[66] RX 11B, C; Carter 80, 81, 136, 137, 267, 268.

[67] Hazard 1165-1170.

[68] See Isbell 1357.

perience in criminal law of most of the prospective "draftees"; an unfair shift of what should be a matter of societal concern to one group of professionals; the appearance of imbalance in the criminal justice system and the likelihood of inadequate representation that arises when the defense but not the prosecutor is expected to work for nothing; and the strong feeling among members of the bar that a lawyer's duty to perform public service should be left to the individual's discretion and he should be free to exercise that discretion by choosing the kind of pro bono work he favors.[69] As it happens, the District's most recent experience with compulsory pro bono, confirms the inherent limitations of the compulsory system. In 1974, when the CJA regulars briefly refused to take additional cases in protest over a fiscal lapse which had dried up all CJA funds, the Chief Judge of the Superior Court directed PDS to draw up a list of all active attorneys so that they might be summoned to serve. Only 43 percent of the attorneys summoned actually reported, thereby demonstrating strenuous bar resistance to the notion of forced contribution of services and a general lack of enthusiasm for

[69] RX's 2Z-19, Z-20, Z-32, 25Z-5; Hazard 1157, 1158, Isbell 1363-66, Lefstein 1480-1484. See also RX's 25Z-4, 26Z-1, 28Q, for the view that compulsory pro bono simply perpetuates the perception that representation of indigents is a form of bargain-basement law and *Ferri* v. *Ackerman*, 444 U.S. 193, 199 (1979) in which the Supreme Court observed:

> The Criminal Justice Act of 1964 [which first gave D.C. lawyers compensation for representing indigents] was enacted to provide compensation for attorneys appointed to represent indigent defendants in federal criminal trials. In response to evidence that unpaid appointed counsel were sometimes less diligent or less thorough than retained counsel, Congress concluded that reasonable compensation would improve the quality of the representation of indigents.

criminal practice. As a result of this incident, the Chief Judge has indicated an unwillingness to impose similar drafts.[70] In any event, there are legal impediments to compulsory pro bono, and from a political standpoint, uptown bar opposition in the District would be so strenuous as to make the likelihood of its adoption remote in the extreme.[71]

As for universal PDS – that is, a system in which the public defender represents all indigents – there is little evidence that it would be a practical solution to the District's indigency problem. Technically, no jurisdiction can ever have a universal PDS if for no other reason than the existence of conflicts in multiple-defendant cases that require the appointment of separate counsel. Even more important is the fact that budgetary constraints on effective indigency representation do not disappear under universal PDS. On the contrary, they are compounded since by definition universal PDS means an increased government payroll with concommitant government salaries and government fringe benefits. When a near universal public defender system

[70] RX 55M-"O"; Carter 216-218, Isbell 1361-1366. See also H. Rep. No. 93-1172, 93rd Cong. 2d. Sess. p. 2 (1974). This reluctance exists notwithstanding the favorable impression made by the drafted lawyers in 1974. The judges found that although the draftees initially had difficulty finding their way around the criminal court system, the quality of their representation was high. This was attributed to the draftees sense of professional pride. RX 55Z-4. See also RX 2Z-9 for similar experience in the Northern District of Illinois, but note "that only on rare occasions do assigned counsel in the Northern District of Illinois elect, in fact, to contest the guilt of their clients and virtually never pursue a case through the appellate process." *Ibid.*

[71] Carter 218, Pickering 1078, 1098, 1100-1102, Isbell 1362-1365, Lefstein 1483, 1484.

has been tried in large urban settings, experience has demonstrated that more often than not caseloads have increased faster than the level of funding, thereby creating staff shortages and making quality representation exceedingly difficult.[72]

Still another possible choice is a contract system in which the city asks private attorneys to bid for indigency work. Although the contract system has been tried in a few small jurisdictions, its possible extension to a large metropolitan area has been sharply questioned on the grounds that the quality of legal service may be compromised if a contractual promise to deliver is made at firm prices regardless of caseload or amount of time required for specific cases.[73]

E. *The Operation Of The District's CJA Program*

22. Appointments under the District's mixed system are made Monday through Friday by one of three commissioners and on Saturdays by a Superior Court judge. The process begins when the CJA Office of PDS receives from the U.S. Marshall's Office a "lock-up list" showing the identity of persons arrested and the offenses charged.[74] After interviewing all persons on the

[72] CX 38L; RX's 25J, 26Z-33; Carter 280, 281, Koskoff 791, Hazard 1166, 1167, Lefstein 1469, 1170. See also RX 26Z-14-Z-22 for a description of the San Francisco public defender office where in shoddy, cramped, roach-infested offices, young attorneys lacking training, supervision, and support staff, attempt to practice criminal law.

[73] RX 26Z-42; Leftstein 1467, 1468.

[74] Three lock up lists are received by PDS' CJA Office each day: an early list of persons arrests during the preceeding night, a midday list of persons arrested that morning, and a late list of persons arrested in the late morning and early afternoon. Carter 74, Robinson 328, 329.

lock-up list to determine their eligibility for court-appointed counsel, PDS presents the list (with the designation "CJA" for an indigent) to the commissioner or judge assigned to make the appointments. Typically, about 85 percent of the persons arrested on the lock-up list have the designation "CJA" next to their names.[75] In addition to the lock-up list, the CJA Office furnishes the commissioner or judge with an "attorneys available list". The attorneys available list shows the names of CJA lawyers who have telephoned the CJA Office of PDS between 7:45 a.m. and 8:15 a.m. to establish their availability for that day. The names of CJA lawyers are entered on the attorneys available list in the order of their telephone calls to the CJA Office.[76]

23. Using the lock-up and attorneys available list, the commissioner (or on Saturdays and holidays a Superior Court judge) usually makes appointments to CJA attorneys by using a simple match-up – the first person appearing at the beginning of the lock-up list is matched with the first attorney appearing on the available list, and so on down the two lists.[77] This rotation, however, may be broken for several reasons. First, at the start of a CJA career, a new attorney, irrespective

[75] Carter 88, 89, 127, Robinson 326.

[76] Carter 70-72, Robinson 313, 314. Heading the attorney available list are the names of the one or two PDS lawyers who are designate to take indigency assignments for a particular day (see, e.g., CX's 165-216D). The PDS lawyers receive what is perceived to be the more complex cases, usually limited to no more than two or three to each designated PDS lawyer on the available list. Carter 88, 89, 96, 176.

[77] JX 5, p. 55, JX 10, pp. 76, 77; Robinson 350-352. Because of the sharp rise in the number of lawyers calling in after the post-boycott fee increase, an alphabetical list has been substituted for the one based on order of call-in. Robinson 357, 358.

of position on the available list, will generally receive only misdemeanors.[78] Second, if a particularly complex case comes up, the rotation will be broken as the commissioner or judge searches for a more experienced CJA lawyer on the available list.[79] Third, the rotation may be broken if a CJA attorney had made a request that he or she receive only a particular type of case (e.g.,

[78] JX 2, p. 63, JX 5, pp. 54, 55, JX 11, p. 82; Perrotta 642, Slaight 953.

[79] JX 5, pp. 53, 55, JX 10, p. 79, JX 11, p. 109; Carter 78, Robinson 321, 322, 350-352, McEwen 436, 438-440, Slaight 953. The complexity of a case is not always apparent to the assignment commissioner since all that he has before him is a charge sheet that makes no distinction between a felony charge, which will plead out quickly, and a misdemeanor having serious implications. JX 13, pp. 44, 45; CX 80C; Addison 905, 906. Moreover, the perception of CJA lawyers is that departures from the usual rotation in the interest of a special appointment to a complex case may be even more haphazard than the rotation itself. Several CJA lawyers testified that an important factor in non-rotational appointments is the personal relationship between a CJA lawyer and the CJA Office. These personal relationships are significant because appointment commissioners often ask the CJA Office to make a recommendation in a complex case. At best, the CJA Office recommendation reflects the limited knowledge that CJA personnel have of actual attorney performance; at worst, recommendations may turn on such bizarre factors as the willingness of a CJA lawyer to turn out for the CJA Office softball team. Furthermore, the very fact that most appointments are made by commissioners rather than judges tends to compound the hit-or-miss nature of the selective appointments. A commissioner, in contrast to a judge, knows little about the actual courtroom capability of CJA lawyers, and with nothing else to go on, an appointment may turn, for example, on how the commissioner reacted to the way a particular CJA lawyer represented a client at a preliminary hearing before the same commissioner. JX 10, pp. 74-77, JX 12, p. 122, JX 13, pp. 41-45; Perrotta 642.

only felonies or only misdemeanors),[80] and some CJA attorneys never receive a serious case whether they want one or not.[81]

24. In general, the most important consideration in making indigency appointments to CJA lawyers is availability.[82] A lawyer must be assigned to every case, and even an inexperienced CJA lawyer may be assigned to a serious felony II if a more seasoned lawyer is not available.[83] Because the District has no shortage of indigent accused, in no time at all (at least in the pre-boycott era) the eager newcomer can obtain a full caseload – many misdemeanors, a few felony II's, and even an occasional felony I.[84] As one veteran CJA lawyer described the operation of the CJA system –

> . . . there was a sense that any lawyer who walked in off the street, if he was a member of the bar, not only qualified to take cases but was entitled to have cases. It was almost a sense that the CJA program was not only a program of representation for indigents but a welfare for broken down or has-been

[80] JX 13, p. 44. On rare occasions the available list is not consulted at all as commissioner, judge, or the head of the CJA Office of PDS asks a lawyer to take a case because of past performance in a similar case, prior representation of the same client, or simply because the CJA lawyer happens to be around the courthouse when a special need arises. Carter 80. In addition, for the few cases originating from grand jury indictments ("grand jury originals"), judges appoint highly regarded attorneys by telephoning them directly or by mailing a notice of appointment. JX 10, p. 79; Perrotta 656, 658, 659.

[81] Perrotta 767, 768.

[82] JX 12, p. 120.

[83] JX 11, pp. 107, 108, JX 12, pp. 120-122.

[84] JX 5, pp. 54, 55, JX 10, p. 74, JX 11, pp. 43, 82, 123; Perrotta 642, 643.

> lawyers. When I first went in to talk to Herb Robinson [Chief of the CJA Office] and he put me on the rolls and indicated what I needed to do to pick up cases and I got a bunch of cases within 30 days, I thought that was attributable to my sterling qualities which were no doubt immediately apparent to him. But it turned out that everybody in those days who put his name down and got all the cases they wanted and more because there were just so many cases and so few people.[85]

25. On the basis of this record, no definitive finding can be made about the performance of CJA lawyers in handling their caseloads except to observe that collectively they move a large volume of cases through the District's criminal justice system. See Finding 19. As for quality, there is plenty of evidence that within the corps of CJA's regulars are dedicated lawyers from public interest backgrounds who consider representation of the poor as the highest calling of the legal profession.[86] Others are drawn by a combination of factors including the attraction of criminal law litigation and a strong desire to be their own bosses (or an equally strong desire to avoid a large corporate practice).[87] There are still others who enter CJA practice as a temporary expedient – a way to pay bills until a civil practice develops.[88] Equally important is the fact that the law schools continue to pour graduates into a job market that is shrinking because of government contraction and deregulation with the result that more than a few

[85] Perrotta 673, 674. See also JX 2, p. 78 for an account of a disbarred lawyer who had accumulated a docket of 300 cases.

[86] JX 3, pp. 205, 206; Branton 1385, 1386.

[87] Klein 945, 946, Slaight 952, 953.

[88] Koskoff 860.

young lawyers come to CJA practice because there are no other jobs available.[89] The mixed motivation of CJA lawyers produces a bar of mixed ability. Many CJA lawyers are credited with doing an excellent job in representing their clients, and the consensus seems to be that the overall quality as well as the number of CJA lawyers had improved markedly even before the boycott.[90] But the CJA corps still has its fair share of courthouse "hangers-on" who take as many cases as possible (usually misdemeanors) in the expectation that without investigation, preparation, or concern for the particular needs of their clients, their cases will plead out, and hassles with Bar Council over charges of ineffective representation will be avoided as a living is scratched out collecting CJA fees.[91]

F. *The CJA Rate Schedule*

26. The origin of pre-boycott CJA fees ($20 for out-of-court time and $30 for in-court time) can be traced back to the 1960's when most criminal cases in the District of Columbia were heard in United States District Court. At that time the local District of Columbia court – the Court of General Sessions – only heard

[89] JX 5, p. 97; Carter 113-115, 232, Perrotta 742, Pickering 1081, 1082.

[90] JX 3, pp. 155, 205; RX 74A; Carter 90, 91, 114, 115, Pickering 1082, 1083, 1085, 1086, Branton 1385, 1386, Lefstein 1506.

[91] Perrotta 652, 653, Pickering 1085, 1086. See also JX 2, pp. 63, 69, 80, JX 11, p. 107. Bar Council, charged with bringing proceedings against members of the D.C. Bar for ethical or competency lapses, is a constant source of apprehension among CJA lawyers. These fears may be largely chimerical since few CJA laywyers have ever been barred from taking cases because of incompetence. See RX 55M

minor misdemeanors. Private attorneys appointed to represent indigents in both United States District Court and the Court of General Sessions were not compensated (except for actual out-of-pocket expenses) under the lofty notion that it was part of their professional responsibility to represent indigents. The concept of uncompensated professional responsibility was largely carried forward into the Criminal Justice Act of 1954 (the federal CJA). This was the first federal statute to provide for compensation but it did so at the niggardly rate of $15 for in-court time and $10 for out-of-court time.[92] The federal CJA Act also provided that compensation could not exceed $500 for felony cases and $300 for misdemeanor cases except in "extraordinary circumstances" – i.e., when a judge determines that payment in excess of the limits "is necessary to provide fair compensation for protracted representation. . . ."[93]

In 1970, the federal CJA was amended by increasing the maximum hourly rate for in-court time from $15 to $30 and the maximum rate for out-of-court time from $10 to $20. The 1970 amendment also increased the maximum compensation per felony case from $500 to $1000 and for a misdemeanor case from $300 to $400. The amendment contained a provision permitting additional compensation of up to $1000 for appellate work and up to $250 for post-trial motions.[94]

By judicial and administrative interpretation (and later by legislative enactment) the federal CJA Act (including the 1970 amendments) was applied to the District's local courts – the Court of General Sessions until 1970 and Superior Court thereafter. But because

[92] RX's 7A-D, 8P-S, 27H, I.

[93] RX 7C.

[94] 18 U.S.C. § 3006A(d)(1)-(3).

of the uncertainty respecting the legality of making payments under the federal CJA to an autonomous local court,[95] in 1974 a District of Columbia Criminal Justice Act (the District CJA) was passed authorizing the Joint Committee On Judicial Administration (consisting of three judges from the District's Superior Court and two judges from the District's Court of Appeals) to promulgate an indigency fee schedule, not to exceed the federal CJA level.[96]

What this all boils down to is that in 1983 (just before the SCTLA boycott) lawyers compensated under the District's CJA were being paid according to a schedule fixed in the federal CJA over 10 years earlier: $30 per hour for in-court time; $20 per hour for out-of-court time; $1000 per case maximum for felonies; $400 per case maximum in misdemeanors; and $1000 per case maximum for appeals.

27. Actual payments to CJA lawyers are made through a voucher method. Vouchers showing the amount and nature of the time spent on a case are submitted to the presiding judge if the case preceded to trial or to a judge in chambers if no trial was held.[97] The presiding judge has the authority to reduce the amount sought and in a small percentage of cases this authority

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[95] The Administrative Office of the United States Courts and the Chief Justice of the Supreme Court took the position that after 1974 funds appropriated for the Federal CJA could only be applied to federal courts, and not to the District's newly created Superior Court. See H. Rep. No. 93-1172, 93d Cong., 2d Sess. pp. 1, 2 (1974).

[96] CX 230A-L; Carter 118.

[97] If a case is not "papered", no voucher may be submitted even though the CJA lawyer put in time on the case before the U.S. attorney decided to drop charges. JX 2, p. 48; RX 55Z.

has been exercised.[98] If the voucher seeks compensation beyond the maximum per case limits of $1,000 for a felony and $400 for a misdemeanor on the grounds that it was an extended or complex matter, the CJA lawyer must submit a statement justifying the request for extra compensation. These requests are reviewed by the presiding judge, and a recommendation in support of extra compensation is then forwarded to the Chief Judge for ratification. Approximately five to ten percent of all vouchers submitted involve requests for compensation beyond the maximum limits. Most of these requests are approved.[99] The average voucher paid to a CJA attorney for trial work in the fiscal year ending September 30, 1983, was $231.21.[100]

28. CJA lawyers do not compete against each other to obtain appointments on the basis of hourly rates or the level of compensation per case. The rates paid per hour to CJA lawyers and the per case ceiling are established by statute, and the same compensation is paid to CJA lawyers irrespective of their level of skill, experience, or the quality of service they render. In short, under the D.C. CJA, there is no head-to-head price competition in the sense that CJA lawyers make

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[98] A voucher may be cut, for example, if it reflects accurately that the CJA lawyer spent a significant amount of time at the courthouse waiting for a case to be called. JX 5, p. 70.

[99] Carter 172, 173. CJA lawyers know from experience, however, that there are certain categories of time spent on a case that should be avoided either in submitting a voucher below the maximum or in asking for an excess. These include hours spent on legal research, waiting in a judge's courtroom, or time spent (particularly in drug cases) in developing sentence alternatives to institutionalization. RX 74B, C. See also JX 5, p. 70, JX 10, pp. 82, 83; Lefstein 1438, 1439.

[100] CX 233L.

price or hourly bids in seeking appointments. Instead, each CJA lawyer accepting an appointment automatically accepts the rate established in the D.C. CJA.[101]

29. The D.C. CJA contains no limitation on the total compensation a CJA lawyer may earn. However, a rule established by the Joint Committee on Judical Administration limited the maximum compensation to $42,000 per annum. Very few CJA lawyers reach the $42,000 maximum.[102] After the 1983 boycott, the maximum was raised to $50,000.[103]

G. *The Impact Of The CJA Fee Level On The Criminal Justice System*

30. The impact of the pre-boycott fee level in the CJA bar was described as early as 1975 in the authoritative report of the Austern-Rezneck Committee, a joint undertaking of the Judical Conference of the D.C. Circuit and the D.C. Bar.[104] Sweeping aside the cant surrounding indigency practice, the Austern-Rezneck Report described the huge gap between the

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[101] JX 10, pp. 77, 78; Lefstein 1436.

[102] JX 10, p. 81, JX 11, p. 124; CX 38N. It is the perception of CJA lawyers that their colleagues who "max out" (i.e., earn the pre-boycott maximum of $42,000) tend to concentrate in the easier misdemeanors and plead out most of their case. JX 11, p. 107; Perrotta 652, 653. It is estimated that the average gross earnings of CJA regulars is about $20,000 per annum. JX 8, p. 77. See also JX 2, p. 86.

[103] Perrotta 652.

[104] The Austern-Rezneck Committee was assisted by a professional staff funded by a grant from LEAA and had several advisory panels drawn from the staffs of the U.S. Attorney's Office and PDS. RX 55B.

facile assumptions behind the District's Criminal Justice Act and the realities of CJA practice.

> We are well beyond the point where it can be said that the criminal justice system in the District of Columbia can function without attorneys dedicated primarily to the practice of criminal law. Since close to 90% of all defendants in this city are indigent, criminal practice necessarily means CJA practice. The courts–especially D.C. Superior Court–seem to have recognized this. And, yet, criminal lawyers continue to be treated as appendages to the system. They are desperately needed, but they are inadequately compensated and frequently abused.[105]
>
> –It is the community as a whole not a relatively small group of attorneys which should bear the financial burden of providing representation for indigent defendants.
>
> –A majority of the attorneys who practice regularly under the Criminal Justice Acts do this for a living. It is their primary source of income, notwithstanding the hope and expectation of Congress that the system can function with attorneys practicing CJA law as a sideline. There are too

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[105] The Austern-Rezneck reference to attorney abuse confirms the perception of some CJA lawyers that they are regarded by those in the criminal justice system (from marshalls to judges) as indistinguishable from their clients to the point that the CJA lawyers themselves are subject to being punished along with the criminals. JX 6, pp. 62, 70, 71; CX 80E. See also Addison 900, 901. A particular sore point with CJA lawyers was a court order providing that they were required to take child neglect cases, the bane of all indigency lawyers since it means that the appointed attorney must look after the child's interests for his or her entire minority. Addison 897, 898.

many cases, too few attorneys, and criminal practice necessarily demands a constant honing of skills and knowledge.[106]

31. The Austern-Rezneck Report found that the existing low rates impacted on all facets of the indigency problem: the ability to attract new talent to represent the poor; the willingness of experienced attorneys to continue in this work; and the quality of representation provided to indigents. Ultimately, the report concluded, the rates reflected on the depth of the District's commitment to protection of the constitutional rights of criminal defendants.

> –The criminal justice system as now constituted may attract new talent, but cannot seem to keep it. Many able attorneys who want to practice criminal law find themselves caught in a dilemma between their sense of commitment and the personal and financial sacrifices involved in fulfilling that commitment. Few enter the practice of criminal law in the hopes of getting rich. But too often, the low rates of CJA compensation drive them out of the criminal law.
>
> –It is axiomatic that lawyers are no different from other people. They cannot be expected to work for little or nothing, just as one would not expect a contractor to build a house without being paid for the cost of labor, materials, and overhead. Yet, criminal lawyers practicing under the Act are frequently asked to provide representation for which they are not paid, or paid very little. One of two things will happen: either the attorney will not do the work that a case requires, at great cost to

[106] RX 55Z-7, Z-8.

> the defendant, or he will do the work and suffer a financial loss.
>
> –Finally and this is probably the most important point a system which is heavily weighed against the indigent defendant in terms of the compensation that his attorney will receive raises serious questions of equal protection. The indigent's rights under the Constitution are no less than the rights of the well-to-do. And, yet, if his counsel is not adequately paid, the indigent defendant has little reason to expect that his rights will receive the protection they would get if he could afford to retain counsel. Not only must the system protect his interests, it must *appear* to protect them if he is to have any confidence in it.[107]

32. The specific recommendations of the Austern-Rezneck Report, including raising fees to $40 for both in-court and out-of-court time, were as follows:

> Appropriations for the D.C. Criminal Justice Act must be increased to ensure that attorneys are adequately compensated and that defendants receive effective representation. The committee strongly supports the efforts of the Joint Committee on Judicial Administration of Superior Court and the D.C. Court of Appeals to obtain increased funding.
>
> The rate of compensation under both the local and Federal Criminal Justice Acts should be raised to not less than $40 an hour for both in-court and out-of-court time.
>
> Counsel should be compensated for work performed in any assigned CJA case, whether or not charges are filed.

[107] RX 55Z-8, Z-9.

The statutory maximum compensation for misdemeanor and felony cases should be raised to $800 or $1600, respectively.

The maximum compensation for representation in post-trial matters should be raised from $250 to $800 if the underlying case was a misdemeanor and to $1600 if the underlying case was a felony.

The $18,000 annual limit for CJA attorneys practicing in D.C. Superior Court should be abolished.

Claims for excess compensation should be treated like any other vouchers; that is, they should not be subject to approval of the trial judge and review by the chief judge of the court. If the disbursement agency has questions about a claim, these may be addressed to the trial judge and the attorney, but it is the disbursement agency which should have final authority.

The $300 limit on compensation for experts, investigators, and other outside services should be mitigated by provisions for excess compensation to experts in appropriate cases.[108]

33. The Austern-Rezneck Report was only one of a series of studies to reach the conclusion that the pre-boycott CJA fees were far too low. The CJA fee structure, however, remained at the $20/20 level between 1975 and 1983 despite the prevalence of run-away inflation and the resulting erosion of even these minimal payments.[109] Further compounding the problem of the adequacy of CJA compensation during this period, was the imposition of additional procedural obligations on lawyers at the very time when the courts (and bar

[108] RX 55J, K.

[109] RX's 38Z-47, 39E, 54I.

associations) indicated a willingness to consider claims of malpractice, ethical malfeasance, and possible violation of Sixth Amendment rights grounded on counsel's inadequate trial preparation in indigency cases.[110] This development alone meant that wary CJA lawyers had to spend more time representing each client than was required when the CJA rates were first set. Another trend that became apparent after the Austern-Rezneck Report was the influx of highly motivated young attorneys who had benefited from participation in clinical criminal programs and who came into CJA practice determined to provide quality representation.[111] Although the combination of the increasingly stringent standards for rendering effective assistance to indigents, and the work of these new CJA practitioners generally improved the overall quality of representation after 1975,[112] criminal justice experts (including current and former District officials directly involved with the criminal justice system) reached the conclusion that the adverse effects of the low rate schedule observed earlier in the Austern-Rezneck Report had persisted into 1983. The consensus of this expert opinion may be summarized as follows–

First, because of the low rate of compensation, CJA regulars were compelled to maintain inordinately large caseloads. The size of a CJA lawyer's caseload, in turn, impacted on the ability to provide quality representation since an excessive caseload inevitably meant limited preparation and investigation time, the two

[110] Hazard 1138-1142.

[111] Carter 229, Perrotta 775, 776, Hazard 1162, 1163.

[112] JX 3, pp. 155-157; CX 38H, I; Perrotta 742, 775, 776, Pickering 1085, Branton 1399.

essentials of effective advocacy.[113] This conflict between manageable caseload and compensation was more often than not resolved by the CJA lawyer accepting far too many appointments in order to make a bare living.[114]

Second, while CJA practice initially attracted able young attorneys, the low rates eventually drove experienced and capable CJA attorneys into more lucrative fields.[115] This loss of attorneys with two or three years experience was described by Professor Hazard, an expert on the problem of maintaining professionalism in the criminal justice system, as the most pernicous effect of a low rate.[116] The tendency of low D.C. CJA rates to drive out of the criminal justice system the most experienced attorneys was also noted by Larry Polansky, Executive Officer of the D.C. Courts. Mr. Polansky observed that because of low D.C. CJA rates there was a changing cadre of CJA lawyers with many "blooded professionals" leaving when they "find that they just can't keep up with the pace necessary to make what is a minimal living out of CJA work".[117] Francis Carter, Director of PDS, agreed with this assessment. He testified that low D.C. CJA compensation discouraged the more ambitious and aggressive attorneys to the point where there was a regular pattern of at-

[113] JX 5, pp. 65, 66; RX 25Z-21-Z-23; Hazard 1144-1146.

[114] JX 8, p. 79, JX 9, pp. 31, 32, JX 12, p. 55; RX 90B, C, E, F; Branton 1410, 1411, Lefstein 1445. CJA lawyers estimate that they must close about 100 cases in order to gross the CJA average of $20,000 per annum. JX 12, p. 42; RX 90E, F.

[115] JX 2, p. 79, JX 7, pp. 26, 27; RX's 39F, 40A, 42I, 46I, 54J, 72A, B; Branton 1386, 1408, 1409, Lefstein 1440-1442.

[116] Hazard 1150-1152.

[117] RX 91C.

torneys staying in CJA practice for a short time and then leaving for financial reasons to seek other avenues of practice.[118] Professor Hazard concluded that the loss of experienced CJA lawyers was especially significant since it meant that there was a shortage of skilled practitioners to handle the low visibility but serious felonies that were not especially attractive to the pro bono departments of major uptown law firms.[119]

Third, low CJA rates meant that indigency practice in the District was conducted under primitive conditions. CJA lawyers were attempting to meet the constitutional requirement of "Assistance" without offices, without secretarial assistance, without paralegals, and basically without any of the standard accouterments of a modern legal practice. Typically, they worked out of their homes and did their own typing.[120] According to Professor Lefstein, a former Director of PDS and an expert in the field of indigency representation, the lack of ordinary support services, which is the hallmark of CJA practice, is not a question of personal deprivation or diminished life style – it impacts directly on the ability of lawyers to represent their clients effectively.[121]

H. *The Pre-Boycott Campaign To Get Higher Fees*

34. Prior to the boycott, the CJA lawyers conducted a vigorous campaign to obtain higher fees. Although they received backing from every segment of the com-

[118] Carter 228, 229.

[119] Hazard 1138-1144, 1150-1152.

[120] JX 8, p. 19, JX 10, p. 81; Isbell 1336, Lefstein 1439, 1440, 1447.

[121] Lefstein 1439, 1440. See also RX 39C. For evidence of the impact of CJA practice on the ability (and incentive) to keep current with legal developments, see JX 8, p. 83.

munity concerned with the criminal justice system, the CJA lawyers were unable to convert this support into effective political action. (Findings 35 to 54.)

35. Interest in the problem of the CJA rates increased markedly after March, 1982, when the report of the Horsky Committee was published. This committee of 42 lawyers had been formed by the D.C. Bar to assess the 1970 reorganization establishing Superior Court as the District's local court of criminal jurisdiction.[122] The Horsky Committee Report noted that the conditions described in the Austern-Rezneck Report had been aggravated by inflation, and recommended that all necessary steps should be "taken by the Superior Court, the Mayor, and the D.C. Council to raise promptly the levels of compensation for attorneys appointed under the Criminal Justice Act to at least the levels proposed by the Austern-Rezneck Committee."[123] Following publication of the report of the Horsky Committee, the D.C. Bar passed a resolution urging a CJA increase. This support of the uptown bar for the cause of the CJA lawyers has continued unfailingly to the present.[124]

36. On June 16, 1982, Bill No. 4-486 was introduced in the D.C. Council to "amend the D.C. Criminal Justice Act to provide a fair compensation level for attorneys appointed under that Act." The bill provided a $50 per hour rate of compensation, with no distinction drawn between in-court and out-of-court time. Bill No. 4-486 also proposed to increase maximum per case compensation to $1,700 for felonies, $900 for misdemeanors, and

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[122] RX 56D-U; Pickering 1058-1061.

[123] RX 56T, U.

[124] JX 13, pp. 27, 28; RX's 57, 59B, 71A-J, 143A, B; Perrotta 690-692, Koskoff 800, Pickering 1066, 1067, Isbell 1311, 1312, 1350-1352.

$1,700 for post-trial matters.[125] Referred to the D.C. Council's Judiciary Committee for consideration, Bill No. 4-486 died at the end of 1982 before any hearings could be held because there was no prospect for passage in view of the lack of money to fund an increase in CJA compensation levels.[126]

37. In September, 1982, shortly after they were elected officers of SCTLA, Perrotta and Kosoff first became deeply involved in the effort to obtain legislation increasing compensation levels under the D.C. CJA.[127] Their first initiative was to discuss the adequacy of existing compensation levels with the Chief Judge of the Superior Court at one of the regular monthly meetings that the Chief Judge held with CJA lawyers. At the September meeting, which was also attended by Larry Polansky, the Court's administrative officer, the Chief Judge took the position that he could do nothing to support legislation increasing CJA rates because the court might have to rule on the legality of any bill passed by the D.C. Council. The Chief Judge and Mr. Polansky stated that they privately believed that CJA lawyers deserved an increase in compensation levels but that the CJA lawyers would have to generate the political support for it.[128]

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[125] RX 60A, B.

[126] JX 7, p. 28; RX 61; Perrotta 686-689, Koskoff 804, Pickering 1066, 1067, Isbell 1312, 1313.

[127] Even before Perrotta and Koskoff took over the leadership of SCTLA, CJA lawyers had lobbied for an increase. The response from the Mayor and Councilmembers before September, 1982, was almost unanimous support but no concrete results were achieved because of lack of funds. JX 2, pp. 53, 54, JX 7, pp. 23-25; Perrotta 679.

[128] Perrotta 679-681, Koskoff 794, 795.

38. In November, 1982, Perrotta and Koskoff met with Herbert Reid, Council to the Mayor, to discuss legislation increasing D.C. CJA compensation levels.[129] Mr. Reid stated that in his view the D.C. CJA compensation levels were inadequate, and while he expressed his sympathy with the need for the legislation, he indicated that the Mayor could do nothing. According to Mr. Reid, since the CJA funds were included in the Superior Court's budget, Perrotta and Koskoff must first attempt to get the Chief Judge to urge a statutory change allowing for an increase. Mr. Reid said that in fact the Chief Judge had never done so, and that it was politically unrealistic to expect the Mayor to support such legislation when no one in authority was pressing for it. At the conclusion of the meeting, Koskoff and Perrotta asked to meet personally with the Mayor, but were told that because there was nothing to talk about, a meeting at that time would be pointless.

39. Perrotta and Koskoff met again with the Chief Judge of Superior Court in early December, 1982.[130] During this and subsequent monthly meetings, the subject of legislation to increase D.C. CJA compensation levels was discussed. The Chief Judge repeatedly took the position that the court could not publicly support such legislation since it might be called upon later to rule on its legality.

40. In January, 1983, Perrotta and Koskoff met with Wiley Branton, then Dean of the Howard Law School.[131] Dean Branton was sought out because of the traditional leadership role of Howard Law School and its dean in the forefront of civil rights causes and civil

[129] JX 13, pp. 28, 37; Perrotta 682, 683, Koskoff 796-799, 810.

[130] Koskoff 798, 799.

[131] Perrotta 689, 690, Koskoff 801-803, Branton 1379-1391.

liberties issues. Dean Branton also had a direct involvement in CJA problems: he had taken indigency appointments at the request of Superior Court judges, and he had assisted CJA attorneys and Howard law students in handling their cases as part of the school's criminal justice clinic. At this meeting, the SCTLA leaders asked Dean Branton for advice on how they should go about securing passage of legislation raising the level of CJA compensation. Dean Branton believed that the prospects of passage for such legislation were poor since there was no compelling political reason for generating the funds necessary for the increase. According to Dean Branton, the basic problem facing the CJA attorneys was the absence of an organized constituency to lobby effectively for the legislation. He noted that the indigent accused obviously had no political power; moreover, criminal defense bar was not held in high esteem by the Mayor, the D.C. Council, the leadership of the community, or the general public. Furthermore, an increase in compensation paid to criminal defense lawyers would not be considered high priority legislation so long as all the cases were being handled and the system was running smoothly. Dean Branton advised the CJA attorneys that since the prospects for passage were dim "they were going to have to do something dramatic to attract attention in order to get any relief."[132] The thrust of his message was that because helping indigent criminal defendants is a politically unpopular cause and the city was not having any problems in getting its cases processed, it was going to be necessary for CJA attorneys to "raise hell".[133] During the course of the meeting, it was mentioned that some

[132] Branton 1390.

[133] Branton 1390.

CJA attorneys were becoming discouraged and were thinking about a strike to draw attention to their plight. Dean Branton replied, "it may well have to come to that."[134]

41. The CJA lawyers, however, gave no serious consideration to a boycott in early 1983 because the legislative process leading to a possible increase was starting anew.[135] On March 17, 1983, D.C. Council Chairman David A. Clarke introduced Bill No. 5-128, providing for a per hour compensation rate of $35 for in-court and out-of-court time.[136]

42. The SCTLA leadership rallied an impressive body of support behind the bill, and when a hearing was held on June 6, 1983, before the Council's Judiciary Committee chaired by Councilmember Wilhelmina Rolark, no witness opposed a CJA rate increase on the merits.[137] The executive branch of the D.C. government, however, again questioned the District's ability to absorb the additional costs of such an increase.[138]

43. Despite the strong showing made at the June 6 hearing, it soon became apparent to the CJA lawyers and their supporters that the hearing had been an empty gesture and that there was little prospect that anything further would happen on the bill.[139] In late

[134] Branton 1391.

[135] Koskoff 803.

[136] CX's 34A, B, 36A-Y.

[137] Perrotta 697, Koskoff 808, Isbell 1314, 1315, 1326, 1327. Supporters included the D.C. Bar (RX 71A-J), Earl Silbert, the former U.S. Attorney for the District of Columbia (RX 72A-E), the American Civil Liberties Union (RX 73A, B), PDS and the Executive Office of the D.C. Courts (RX's 24A-G, 91A-N).

[138] CX 36F; RX's 86E, 87E, G.

[139] JX 12, p. 34, JX 13, p. 54; Perrotta 697, 698, Addison 881, 882, Isbell 1317, 1318, 1328.

June, Kemi Morton of Councilmember Rolark's staff told Koskoff that passage of the bill was unlikely because there was no source of funding.[140] Thereafter, Koskoff spoke with Councilmember Rolark and was informed that although the Council was sympathetic, no money was available to fund Bill No. 5-128.[141] Similarly, Betsy Reveal, the city's Budget Director, told that SCTLA leaders that the entire D.C. government supported their demand for higher fees, but that no money could be found.[142]

44. These discouraging reports notwithstanding, Perrotta and Koskoff (and later respondent Addison) continued their lobbying effort throughout the summer of 1983. As part of this effort, Addison and Koskoff met with Timothy Leeth, a member of the staff of the Subcommittee on the District of Columbia of the Senate Committee on Appropriations, to discuss the subject of possible federal funding to increase the level of compensation.[143] Mr. Leeth informed Addison and Koskoff that Congress was sensitive to the District's Home Rule status and therefore would not support an increase in rates under the D.C. CJA until the District itself had acted, either through a request from the Chief Judge of Superior Court or through a bill enacted by the D.C. Council.

45. In early August, 1983, Koskoff and Addison buttonholed the Mayor in a corridor of the District Building.[144] They asked again about the prospects for passage of Bill No. 5-128, and were told by the Mayor

[140] Koskoff 809.

[141] JX 13, p. 62; Perrotta 697, 698.

[142] JX 11, p. 94.

[143] JX 13, pp. 150, 151; Koskoff 811-814.

[144] JX 12, p. 37, JX 13, pp. 62-65; Koskoff 810, 811, Addison 884.

that he was sympathetic, but the money was not available to fund an increase, and that he did not know where the money would come from. Referring to a riot in city jail which inspired Congress to appoint seven new judges, improve the cell block, and carpet the courthouse, the Mayor spoke wryly of $28 million falling "from the sky. . . . [but] there is no money for you." [145] The Mayor agreed to another meeting on August 29, 1983.

46. After the conversation with the Mayor, Addison and Koskoff informed the other CJA lawyers at an SCTLA meeting in the Lawyers' Lounge on August 7 or 8 that while they were repeatedly told by D.C. officials that they supported Bill No. 5-128, and that these officials recognized the need to increase the CJA compensation levels, these same officials insisted that no money could be found to fund the legislation.[146] On the basis of this report, the CJA lawyers voted to form a "Strike Committee" for the purpose of developing an action plan that went beyond the lobbying campaign. Perrotta named SCTLA member David Hirsch as temporary head of this Strike Committee.

47. Following the SCTLA meeting of August 7 or 8, the Strike Committee met in the office of CJA lawyer Roger Pickens.[147] The consensus at this meeting was that the previous lobbying efforts had been futile, that the only viable way of getting an increase in fees was to stop signing up to take new CJA appointments, and that

[145] JX 13, p. 64.

[146] JX 5, pp. 13-16; Addison 882-884.

[147] JX 6, pp. 21-24. The Strike Committee members were Joanne Slaight, Cheryl Stein, Abe Blitzer, Jeffrey Stulman, Ron Goodbread, Davies Couch, David Hirsch, and Roger Pickens. JX 5, p. 16, JX 10, pp. 20-23.

the boycott should aim for a $45 out-of-court and $55 in-court rate schedule.[148] Slaight was designated at Chairperson of the Strike Committee and various other "strike" assignments were handed out.[149]

48. On August 11, 1983, a group of about 100 CJA lawyers met at an SCTLA meeting in the Lawyers' Lounge.[150] Addison and Koskoff again emphasized that the Mayor and Councilmember Rolark were sympathetic, but that both had insisted that there was no money available to fund Bill No. 5-128. They also reported that the Chief Judge had again refused to support a bill increasing rates. At this point, Slaight reviewed the substance of the discussion that had taken place at the Strike Committee meeting in Roger Pickens' office. Edward Shannon, a CJA regular, called for an immediate strike. This motion was voted down. Roger Pickens then moved to strike on September 6 if the statutory rates were not raised by then. Pickens' proposal carried by a voice vote, indicating solid agreement by the CJA lawyers not to call in for new cases if the pending legislation had not moved forward by the strike date.

49. Immediately following the August 11 SCTLA meeting, a petition was drafted by Strike Committee

[148] JX 10, pp. 20-23.

[149] JX 10, pp. 32, 33. The Strike Committee designated Perrotta, Koskoff, and Addison as the "Negotiating Team". JX 5, pp. 23, 24. Assignments to other CJA lawyers included responsibility for contacting "all groups of lawyers who may support us or be used as strikebreakers," (CX 14), letting all CJA lawyers know about the boycott (JX 5, p. 26, JX 10, pp. 31, 32), soliciting the support of courthouse personnel (JX 5, p. 25, JX 8, p. 29, JX 10, pp. 34, 35) and working with the media. JX 5, p. 18, JX 10, pp. 31, 32.

[150] JX 8, pp. 24-27, 48, JX 10, pp. 18, 19, JX 11, pp. 28-33, 119, 120, JX 13, pp. 48-50, 78, 79.

member David Hirsch and edited by Perrotta.[151] The petition, which was placed on the blackboard of the Lawyers' Lounge in Superior Court, stated:

> We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.[152]

The petition was signed by a number of CJA attorneys including Addison and Slaight, but not by Koskoff or Perrotta.[153]

50. Although the CJA lawyers had already voted in favor of boycotting Superior Court, the lobbying effort of the SCTLA leadership continued throughout the late summer.[154] On August 29, 1983, Perrotta, Addison, and Koskoff, accompanied by Jacob Stein, former President of the D.C. Bar, met again with the Mayor at the District Building to review the prospects for passage of the legislation increasing CJA fees.[155] During the meeting, the Mayor said repeatedly that he supported Bill No. 5-128, that he knew CJA attorneys needed an increase, that it was long overdue, and that CJA attorneys did useful work at extraordinarily low rates. He stated,

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[151] JX 6, pp. 35-38, JX 11, pp. 63-65.

[152] CX 4B-D.

[153] JX 2, pp. 115, 116, JX 6, pp. 37, 38, JX 11, pp. 63, 64, JX 13, p. 131; Koskoff 814. Apparently, Perrotta and Koskoff abstained from signing the petition and voting in favor of the strike to avoid the charge that SCTLA officers had led an unwilling membership into a boycott. See JX 12, p. 36.

[154] JX 12, pp. 35-37, JX 13, p. 63; Addison 883.

[155] JX 5, p. 48, JX 11, pp. 41, 49, 121, JX 12, pp. 38, 72, JX 13, pp. 63-68; Perrotta 700-702, 721, Koskoff 815-817.

however, that he did not know where he would find the money to fund the increase. He promised to make a concerted effort to do so, but indicated that it would be impossible to meet the September 6 deadline.

The August 29 meeting with the Mayor was very friendly. No threats were made on either side. The Mayor knew about the August 11 vote to stop calling in for new appointments after September 6 if the legislation did not pass by then. He made no effort to dissuade respondents from the boycott. During the meeting there was a lot of smiling back and forth, and the Mayor said, "You do what you have to do, and I will do what I have to do." [156] This was said in the context of his explanation that the normal legislative process takes several months, but if an emergency existed the legislative process could be expedited and a bill passed within a week or two. The Mayor explained that if there were an actual crisis at the courthouse, this would constitute an emergency to which he could respond.[157]

51. The record does not lend itself to a definitive finding on whether the pre-boycott 1982-1983 campaign of the CJA lawyers constituted exhaustion of the political process to the point that a continued lobbying would have been fruitless. To illustrate, there is testimony suggesting that an alternative political strategy, one presenting a unified CJA and PDS demand for increased overall indigency funds, may have been productive.[158] The fact that the PDS budget is handled sepa-

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[156] JX 11, p. 49, JX 12, pp. 37, 38, 126, 127, JX 13, p. 65; Perrotta 701, Koskoff 816, 817.

[157] JX 11, p. 49, JX 12, pp. 38, 127.

[158] Carter 288-290. But for opinions respecting the dim prospects in 1983 for success from further political lobbying by SCTLA see Tucker 1265, 1266, 1270, 1271, Isbell 1328, 1330, Branton 1384, 1385, 1396.

rately from the CJA budget (the CJA budget is buried within the Superior Court's appropriation; PDS is funded as a separate executive-level agency of the District's government) seems to be a lame excuse for the failure to make even an attempt at such a unified approach.[159] On the other hand, the record indicates that not only do PDS lawyers and CJA lawyers consider themselves rivals for whatever limited indigency funds are available, but that the day-to-day relationship between the two is strained to the point that effective political cooperation was unlikely.[160] In addition, it should be noted that the track record up to 1983 of unsuccessful attempts by even the most prestigious, and presumably

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[159] See Perrotta 695, 696.

[160] By the very nature of its dichotomy between high volume and complex cases, the District's mixed system does not lend itself to a relationship of mutual respect and cooperation between PDS and CJA lawyers. Because of its limited caseload (concentrated in felony 1 cases), tradition of excellence, its well-known zeal on behalf of its indigent clients, and its reputation as an office where young lawyers are soon exposed to challenging litigation, PDS is swamped with applications from recent graduates of the most prestigious law schools. The very virtues of PDS, however, tend to instill an elitist attitude among its lawyers that is not conducive to a close, mutually supportive relationship with the CJA lawyers who more often than not come from a more humble background. Carter 115, 116, 290, Lefstein 1422. For their part, the CJA lawyers seem to harbor a deep resentment over what is perceived as an unfair allocation of awards and brickbats – PDS is seen as garnering all the glory (and almost 40 percent of indigency funds for handling relatively few cases) while the CJA lawyers are treated contemptuously as "Fifth Streeters" even though they move over 85 percent of the cases through the District's criminal justice system. JX 11, pp. 132, 133; CX 80A-E; Addison 903-910. In addition to a general feeling of resentment, CJA lawyers have some specific grievances. One particular sore point straining the relationship between PDS and CJA lawyers is the dispute over investigators. PDS has a paid

influential groups, to obtain increased compensation under the federal CJA, could not have inspired the CJA lawyers with confidence during the summer of 1983 that any modification in lobbying strategy would have produced markedly different results at the local level.[161]

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staff of investigators who are often by-passed in favor of a spirited group of volunteer college interns assigned to the PDS Office. When PDS investigators are not being used by PDS attorneys, however, the CJA Office of PDS insists that the CJA lawyers use these investigators. CJA lawyers, on the other hand, believe that they have no control over PDS investigators and would prefer to retain private investigators. This preference can easily be overruled since in the first instance CJA vouchers (including vouchers for outside investigators) are processed by personnel in the CJA Office which, of course, is a division within PDS. Perrotta 668-670, Addison 898, 899. Even apart from the question of PDS investigators, other PDS services available to CJA lawyers – library, motions file, appellate brief file, access to PDS duty-day attorney to answer questions about criminal law procedure, and assistance to CJA counsel in formulating alternatives to incarceration – are not highly valued by CJA regulars. O'Neill 533, 534, Perrotta 667, 668.

[161] See Perrotta 761-762. An increase in the federal CJA level would have at least authorized the Joint Committee on Judicial Administration to raise the D.C. rates even without new legislation from the D.C. Council. See Finding 26. The most recent effort for an increase in the federal CJA began in 1980 when the Judicial Conference of the United States and the National Association of Former United States Attorneys adopted resolutions supporting an increase in the federal rates. In 1981, the Judicial Conference transmitted a draft bill to Congress. It was introduced in the House but no further action was taken. The American Bar Association in 1982 adopted a resolution favoring an increase. And again in 1983, the Judicial Conference urged the passage of a rate increase. Hearings were finally held on a rate bill in June and July, 1983. While support was almost universal, the Department of Justice opposed the bill on the grounds that the increase should be considered as part of a comprehensive examination of fees, including fees in civil cases. Because of Justice opposition, no further action was taken

52. Although there is room to speculate on the soundness of the lobbying strategy adopted by the CJA lawyers, there can be no serious question that the pre-boycott efforts of the CJA lawyers had largely failed because indigent criminals and their lawyers are not a politically significant constituency; on the contrary, there is political capital to be made if the rights of the indigent accused are denigrated.[162] This hostility toward

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on the federal bill in 1983. RX's 35A-37R, 40A-T, 42A-49C. On October 15, 1984, however, the following item appeared in the "Lawyers" column (p. B2) of the *Washington Post*:

> Members of Congress couldn't have been in more of a hurry to get out of town last week. Before they left, however, they approved a measure of interest to attorneys in federal courts here and around the country: doubling the salary of lawyers who represent indigent defendants in criminal cases before the federal bench.
>
> The measure raises the hourly rate lawyers receive from $20 for work out of court and $30 for court appearances to $40 and $60 an hour, respectively. That should comes as a welcome relief to the attorneys. Many had drifted away from the federal court here after lawyers in D.C. Superior Court negotiated a hefty raise from city officials following a walkout last year.
>
> But the question now is: How will Superior Court attorneys react to the new federal pay? The new federal rate is substantially higher than the new local one, which is $35 an hour for work in or out of court.
>
> Traditionally, the local rate is pegged to what lawyers get in federal court. It remains to be seen whether lawyers will invoke this to get another raise from D.C. officials.

Whether or not the federal CJA would have gone us without the pressure engendered by an increase in District CJA rates is, of course, not developed in this record.

[162] JX 11, p. 134, JX 12, p. 41; RX's 26V, W, 79A, B; Addison 881, Hazard 1153. This lack of political support for indigency programs is by no means unique to the District. The general failure of criminal indigency program to attract support can best be illus-

criminal defendants generally has a carry-over effect to the funding for the lawyers who represent them.[163] Moreover, at a time when all programs must contend for scarce public funds (by law, the District must adopt a balanced budget)[164] funding for indigency programs may be resisted on the grounds that more aggressive representation by criminal lawyers, which might be made possible, say, by reducing the caseloads of CJA lawyers, is precisely what the community does not want since it may interfere with the efficient processing of bodies through the criminal justice system.[165]

53. The inability of lawyers for the indigent to command political support (on both the national and local levels) may also reflect the spillover effect from the public's image of the criminal lawyer. In general, this image is not favorable. First, there is the public perception of a few "mouthpieces" who are, in effect, house counsel for the organized crime groups which run the nation's gambling, prostitution, and narcotics traffic.[166] Second, many of our larger cities harbor a distinct non-indigent criminal bar of low legal ability and dubious ethical quality which one expert described as follows:

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trated by the fact that in the allocation of public funds, the indigent defense programs are usually left out in the cold. Nationally, indigent defense receives about 1.5 percent of state and local government criminal justice funds whereas prosecution services receive 5.9 percent, the judiciary 13.1 percent, corrections 24.7 percent, and police protection 53.2 percent. RX 26S. See also Lefstein 1486.

[163] Hazard 1153, Lefstein 1486.

[164] Tucker 1247.

[165] JX 11, p. 105, JX 12, p. 54; Perrotta 689, 690, Addison 908-911.

[165] JX 11, p. 105, JX 12, p. 54; Perrotta 689, 690, Addison 908-911.

[166] RX 28N.

These lawyers haunt the vicinity of the criminal courts seeking out clients who can pay a modest fee. Some have referral arrangements with bondsmen, policemen, or minor court officials. They negotiate guilty pleas and try cases without investigation, preparation, or concern for the particular needs of their clients. Because the prosecution is frequently willing to recommend a light sentence in exchange for a guilty plea in a routine case, the dispositions which these lawyers arrange often appear satisfactory to defendants and other laymen who are ignorant of the fact that the result owes little to the capability of the lawyer. Fed by this ignorance, the reputation of the courthouse lawyer grows, and he attracts a substantial portion of the paying criminal business. The insufficiency of his performance thereby comes to taint in large measure the image of all defense counsel.[167]

Finally, in the District itself, the CJA bar is not made up entirely of dedicated idealists. See Finding 25.

54. A possible contributing factor in the failure of the pre-boycott efforts of the CJA lawyers, may have been widespread ignorance about the District's mixed system. Even many uptown lawyers were under the mistaken impression that PDS, rather than the CJA lawyers; carried most of the indigency burden.[168]

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[167] RX 28N-"O".

[168] JX 12, p. 33. See also Addison 880 for evidence that members of City Council and the Mayor's office were unaware of either the number of cases CJA lawyers were forced to take in order to survive or the primitive conditions under which they were working.

I. *The Boycott*

55. By late August, 1983, based on their perception that the lobbying effort had failed, SCTLA activities thereafter were directed thereafter at assuring the success of the boycott scheduled to begin on September 6. The leading uptown firms were urged by SCTLA (in a letter over Perrotta's signature) to "support [SCTLA's] goals by not making your firm available to accept cases during this period."[169] Later, SCTLA leaders addressed several lawyers' associations, and their plea that members of these associations not take indigency cases after September 6, was answered affirmatively.[170] Since almost all the CJA lawyers had already indicated their agreement with the boycott, little had to be done in the way of additional persuasion, but all CJA lawyers were contacted to make certain of their support.[171] In addition, an effort was made to persuade the few holdouts among the CJA lawyers to join with their colleagues in the boycott.[172]

56. Beginning on September 6, 1983, the named individual respondents and all but a few CJA regulars stopped calling in to the CJA Office for the purpose of having their names placed on the daily list of attorneys willing to accept CJA appointments.[173]

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[169] CX 6A. The 40 firms contacted by the SCTLA Strike Committee were the same firms PDS approached later for volunteers. See CX7 A-D. The list of firms, consisting of those with the most conspicuous pro bono programs, was originally compiled by the D.C. Bar for the use by PDS, but at the request of SCTLA it was sent to the Strike Committee. JX 10, pp. 42, 43, JX 11, pp. 70-73, JX 13, p. 142; Perrotta 711, 712, 746-748, Isbell 1345.

[170] JX 10, p. 49. See also JX 5, pp. 34, 35.

[171] CX's 8A-10J.

[172] O'Neill 543, 544.

[173] JX 13, pp. 71, 111. At most, 13 of the CJA regulars continued to take assignments. CX's 216D, 217E, 218E, 221E, 228E; Robinson 362-367, 380.

57. The immediate goal of the boycott was to increase the compensation paid to CJA lawyers.[174] The CJA lawyers also believed that their rate of compensation was directly related to the quality of representation provided to indigents since it almost compelled them to carry an excessive caseload and allowed for none of the essential support services identified with a professional practice.[175]

58. In addition to the refusal by the CJA lawyers to take on new cases, SCTLA staged a series of events–rallies, picket lines, handouts of "press kits", newspaper and T.V. interviews–all designed to educate the general public about the plight of the CJA lawyers in the expectation that this would result in additional pressure on the District government to increase fees.[176] These efforts were initiated by the Strike Committee, which had been formed after the August 7 or 8 SCTLA meeting in Roger Pickens' office, and which by August 26 was clearly identified as the "SCTLA Strike Committee".[177] While the hoopla organized by SCTLA did attract media attention and editorial support,[178] there is no credible evidence that the District's eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure.[179]

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[174] JX 5, p. 30, JX 7, p. 34, JX 8, pp. 35, 36, JX 10, p. 108, JX 11, p. 32, JX 13, pp. 90, 91; CX 4B.

[175] JX 8, p. 80, JX 9, p. 31, JX 10, pp. 18, 19, 25, 100-102, JX 12, p. 118; CX's 8D-K, 38I; Slaight 958-960.

[176] JX 1, ¶ 50, JX 5, pp. 46, 47, JX 8, pp. 41, 84, 85, JX 10, pp. 48, 49, 55, 56, JX 12, pp. 62, 90; CX 6C-J; RX 106A-D; Koskoff 818-822, Addison 885, 886, Kline 923-927, Slaight 960-962.

[177] JX 10, pp. 32, 33, 122; CX's 8A, 14.

[178] RX's 110A-139.

[179] See Slaight 943.

59. If respondents tend to overemphasize the so-called "educational" aspects of the boycott, complaint counsel are inclined to do the same with their charge of physical harassment. A few minor incidents of doubtful propriety aside,[180] the CJA boycott was a peaceful effort.[181]

60. The expectation of the CJA lawyers was that their boycott would have a severe impact on the District's criminal justice system.[182] This expectation was fully realized for essentially three reasons.

First, the incidence of crime in the District does not subside because of the sudden nonavailability of lawyers.[183]

Second, the criminal law requirements that a lawyer be assigned to each case almost immediately upon arrest of the accused and that the assigned lawyer's investigation and preparation proceed apace to meet certain early deadlines–arraignment or presentment date, preliminary hearing, status hearing–are not changed either by the sudden nonavailability of enough lawyers or the imposition of massive caseloads on those who are available.[184]

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[180] See JX 5, pp. 70, 71, JX 8, pp. 63, 64, JX 10, pp. 57, 58; McEwen 454, 455 for use of a "scab" poster with names of non-boycotting CJA lawyers and Robinson 342, McEwen 449-453, 458, 492, O'Neill 550-553 for some rude treatment of the non-boycotters.

[181] JX 3, p. 180, JX 5, p. 26, JX 9, p. 39, JX 12, pp. 107, 108; O'Neill 542-544.

[182] JX 5, pp. 75, 76; CX 234; See also Perrotta 740.

[183] During the period from September 6 to September 20, there was a daily average of 63 defendants on the weekday lock-up list and 43 on the Saturday list. CX's 216A-228E.

[184] JX 2, pp. 110-114, JX 5, pp. 62-64, 73; CX 231B; RX 105A-J; McEwen 415-420, 448, 449, O'Neill 553-555, Perrotta 703-705, Kline 932, 933.

Third, there was no one to replace the CJA regulars, and makeshift measures were totally inadequate.[185] A few days after the September 6 deadline, PDS was swamped with cases.[186] The handful of CJA regulars who continued to take cases were soon overloaded.[187] The overall response of the uptown lawyers to the PDS call for help was feeble,[188] reflecting their universal distaste for criminal law, their special aversion for compelled indigency representation, the near epidemic siege of self-doubt about their ability to handle cases in this field, and their underlying support for the demands of the CJA lawyers.[189] Most of the law student volunteers initially observed the boycott, and later all law student volunteers were limited (as they usually are) to a relatively few minor misdemeanors.[190]

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[185] JX 6, p. 69, JX 10, pp. 65, 85-87, JX 11, p. 45, JX 12, p. 80, JX 13, pp. 76, 101; Isbell 1352, 1353, 1367, 1368.

[186] JX 5, p. 72; Carter 95-97.

[187] JX 3, pp. 150-152; CX's 216A-228E; McEwen 444, 445, O'Neill 545, 546. Prior to the boycott some 35 to 40 CJA regulars called in daily. Robinson 323. After September 6, no more than three or four CJA regulars called in each day. JX 6, p. 69, JX 8, pp. 73, 74; Robinson 380. The number of cases handled by CJA regulars dropped from 85 percent of the total to under 8 percent. Robinson 380.

[188] JX 13, pp. 192, 193; Carter 99-102, 274, 275, Robinson 338, 339. The uptown bar's response was barely adequate at the outset of the boycott, and fell off precipitously in the second week, amounting in all to a handful of associates who picked up a few misdemeanors. Carter 95, 99, 100, Robinson 338, 339.

[189] JX 10, p. 47, JX 13, pp. 192, 193; Lefstein 1479-1484, Branton 1404-1406. In the serious case likely to go to trial, this self-doubt is fully justified, and for the lawyer who does not specialize in criminal law to take such a case would amount to malpractice. Hazard 1158.

[190] Carter 98, Robinson 339, 340.

61. The boycott succeeded when key figures in the District's criminal justice system – Francis Carter of PDS and the Chief Judge of Superior Court – became convinced that the system was on the brink of collapse because of the refusal of the CJA lawyers to take on new cases. On September 15, 1984, PDS hand-delivered to the Mayor, the Chief Judge, and Councilmember Rolark the following letter:

> Dear Mayor Barry:
>
> We are writing to apprise you of the extremely serious situation that has now developed with respect to the legal representation of indigents in criminal and juvenile delinquency cases in the Superior Court of the District of Columbia. We believe that despite substantial efforts by the Public Defender Service of the District of Columbia ("the Service") the current difficulties in providing counsel in these cases will, by early next week, reach a crisis point.
>
> As you know, the private attorneys who regularly make themselves available to the court for this type of representation are compensated under the District of Columbia Criminal Justice Act, 11 D.C. Code 2601 *et seq.*, at a rate of $20.00 an hour for out-of-court time and $30.00 an hour for in-court time. In August of this year the members of the Superior Court Trial Lawyers Association announced that commencing on September 6, 1983 they would no longer accept cases for indigents because this low rate of compensation prevented them from providing adequate legal representation. Attorneys employed by the Public Defender Service to represent indigent defendants in criminal cases are not compensated under the

Criminal Justice Act, for PDS attorneys are full-time salaried employees and are statutorily prohibited from engaging in any other practice of law or receiving any fee. Since September 6 the Service's attorneys (small in number when compared to the need) have assumed the representation of a very sizable number of the indigent defendants, sometimes as many as eight or nine a day per attorney. This added burden comes at a time when the PDS attorneys were already handling very high caseloads. Therefore, the Service now finds its resources taxed to a point where as of the beginning of next week it can no longer provide this quantity of assistance to the criminal justice system while continuing to render quality, effective legal representation.

Additionally, during this very trying period for the court, the Service has had the overwhelming task of continuing to ". . . coordinate the operation of a . . . system for appointment of private attorneys to represent . . ." indigent defendants. D.C. Code § 1-2702(b). We have done this by soliciting assistance from members of our local bar whether they are in solo practice or small or large firms in our city. While the response thus far has been gratifying, it has not been sufficient to continue to assure the appointment of counsel for all indigent defendants. The daily need for representation of indigent defendants (sometimes over 80 such cases a day) has at this point seriously depleted the resources of the private bar who have volunteered to help the court. This leads the Service to conclude

that future assistance from this source is problematic, at best.

We respectfully but strongly believe it is imperative for you, together with Councilmember Wilhelmina J. Rolark, Chairperson of the Council's Committee on the Judiciary, and Chief Judge Moultrie of the Superior Court, as leaders and members of the three branches of the city's government to meet before the end of this week to decide on an immediate course of action to address the situation. You are aware that the Service and several other individuals and organizations testified on June 6, 1983 in favor of Bill No. 5-128 (the District of Columbia Criminal Justice Improvements Act of 1983) before the Committee on the Judiciary of the District of Columbia Council. This legislation will, among other things, increase all hourly rates of the local Criminal Justice Act to $35.00 an hour. A public declaration of your unified support for this Bill and of specific efforts to effect its enactment would, we believe, help greatly to resolve the present situation. In urging this initial course of action, we understand that the enactment of Bill 5-128 would have some fiscal ramifications. But the Service hopes that any additional appropriations necessitated by enactment of the Bill will be viewed not only in the context of a given fiscal year but also in the context of the absence of any intervening adjustments over more than a decade. From that perspective, larger CJA appropriations constitute a very modest investment.

We would be happy to provide you with more particular information on this crisis and will be happy

to meet with you, if necessary, but the need for expedited action cannot be overemphasized.

Sincerely,

/s/ Vincent H. Cohen
Chairman, Board of Trustees

/s/ Francis D. Carter
Director
Public Defender Service[191]

62. The serious situation depicted in the PDS letter was confirmed when the Chief Judge of Superior Court informed the Mayor that the criminal justice system was approaching a crisis point.[192]

63. Upon receipt of the PDS letter, the Mayor telephoned Koskoff to request a meeting that very evening (September 15) with her, Perrotta, and Addison at a downtown restaurant.[193] The meeting was friendly. The Mayor shook hands all around and congratulated the SCTLA leadership on the success of the boycott. The Mayor then stated that since an emergency now existed, Bill No. 5-128 could be taken up as emergency legislation. He indicated that he would make a public expression of support for the bill by writing a letter to Councilmember Rolark stating that the necessary

[191] CX 31A-C.

[192] Isbell 1352. During the course of the boycott, the Chief Judge indicated that he was sympathetic to the demands of the CJA lawyers but he opposed the use of a boycott. RX 140; Isbell 1352, 1353. Several associate judges of Superior Court expressed their support for both the objective and the method. JX 13, p. 82.

[193] JX 11, pp. 44-48, JX 12, p. 80, JX 13, pp. 73-76, 100, 101; Perrotta 720-724, Koskoff 824-827.

money to fund the increased compensation levels provided for in Bill No. 5-128 would be found. The Mayor next discussed the mechanics by which the bill could be considered as emergency legislation. He stated that Councilmember Rolark had already informed him of her willingness to mark up and report an emergency bill out of the Judiciary Committee on Monday, September 19. Furthermore, the Mayor said that he understood that D.C. Council Chairman Clarke would suspend the rules of the Council and bring the bill before the Council the following day, Tuesday, September 20, and that the bill would pass on September 20, as an emergency measure. The Mayor explained that two versions of 5-128 would be considered – an emergency bill, which would pass immediately, and an identical permanent bill, which would have to go through the usual legislative process. The Mayor said he would sign the emergency bill as soon as it was passed. In response to Addison's question about when the CJA lawyers should return to work, the Mayor answered by recalling his days as a civil rights organizer, and based on that experience, he said that if he were in the same position of the boycotting CJA lawyers, he would not begin calling in to accept appointments until after the emergency bill had passed. The Mayor also informed the SCTLA leaders that he would agree to support still another bill to increase CJA hourly rates to the $45/$55 level after Bill No. 5-128 had passed in both its emergency and regular forms, but that this bill, too, would have to be considered in the normal course of events.

64. On September 16, 1983, the Mayor wrote to Councilmember Rolark.

> [B]ecause I believe in the importance of quality representation for indigent defendants and ap-

preciate the significance of the Criminal Justice Act program to the administration of justice in the District, I will, if this legislation is approved by the Council, initiate reprogramming or supplemental actions during FY 1984 sufficient to ensure that the courts have adequate resources to cover the increased costs.

As you know, my position has modified somewhat in the past months. This has been due in large part to your diligence in pursuing the bill, your hard work over the issue of indigent defense, and your support of my efforts to ensure that the Council make a commitment to necessary revenue measures when actions with fiscal impact are taken, [which] has persuaded me that the bill should not be opposed simply because of the financial consequences. I appreciate your and Chairman Clarke's efforts on behalf of this bill, and I look forward to our continued cooperation on matters involving public safety and the administration of justice in Washington, D.C.[194]

65. On the same day that the Mayor was writing his letter, Koskoff and Addison were meeting with Councilmember Rolark at the District Building.[195] Councilmember Rolark explained the emergency legislative process, and stated that her committee would mark up two versions of Bill No. 5-128 at a committee meeting on Monday, one to go through regular channels and the other to be considered as emergency legislation. Councilmember Rolark stated that she was willing to expedite passage of the emergency legislation, that she

[194] CX 36X, Y.

[195] JX 13, pp. 96-99; Koskoff 827-831.

had always been concerned about the issues underlying Bill No. 5-128, and that she was glad that the Mayor had found a way to fund the emergency bill. Councilmember Rolark, Koskoff and Addison then went down the hall to the office of Council Chairman Clarke. Council Chairman Clarke stated that he would move to suspend the rules so the Council could consider Bill No. 5-128. Koskoff expressed her concern that some striking CJA attorneys would not accept the Mayor's proposal because they sought fees above the $35 level. Councilmembers Clarke and Rolark agreed to introduce a permanent bill to increase CJA hourly rates to the $45/$55 level. Koskoff also requested Councilmembers Clarke and Rolark to accompany her to the Superior Court Building to explain the Mayor's proposal to CJA attorneys who continued to demand a $45/$55 hourly rate.[196] Councilmembers Clarke and Rolark agreed to do so, and a meeting was held in a conference room at the Superior Court during the afternoon of September 16.[197] Those present at this meeting included Koskoff and Slaight, as well as CJA lawyers James Tatem, Davies Couch, and Roger Pickens. Also present were Claudia Schlosberg of the Family Division Trial Lawyers Association, and David Isbell, President of the D.C. Bar. The proposal of the Mayor and Council-

[196] When the SCTLA Strike Committee was first formed, the $45/$55 rate was prominently mentioned. See Finding 47. Koskoff and Perrotta reached the conclusion that these levels were not politically feasible and had convinced most CJA lawyers to moderate their demands. Those who remained adament about the $45/$55 rate were organized around the so-called "Ad Hoc Committee" led by Roger Pickens. JX 12, pp. 83, 115. Pickens is not a member of SCTLA.

[197] JX 8, p. 47, JX 10, pp. 66, 67, JX 13, pp. 99, 100, 103, 104; Koskoff 830, Isbell 1350-1352.

members Clarke and Rolark was reviewed at the meeting, including the emergency legislative procedures. Councilmembers Clarke and Rolark also reiterated their willingness to introduce a bill to increase hourly rates to the $45/55 level, but this bill would be in permanent form only and would have to be taken up in the normal course of legislative business. Council Chairman Clarke stated firmly that the $35 rate was all the D.C. Council would currently pass. He presented the proposal as a take it or leave it proposition, saying nothing would be passed if the CJA lawyers rejected it, and that he had to know by 1:00 p.m. on September 19 whether the CJA lawyers would return to work if Bill No. 5-128 were to pass on an emergency basis.[198]

66. At noon on September 19, 1983, SCTLA convened a meeting of CJA attorneys in the Lawyers' Lounge to consider whether to accept the $35 proposal and to end the boycott.[199] The meeting, which was attended by over 100 CJA attorneys, was presided over by Perrotta as President of SCTLA. The Mayor's proposal and the emergency legislative process for enacting Bill No. 5-128 were reviewed by Perrotta. Debate was then held with each side alloted 10 minutes to make its case. Perrotta, Koskoff and Addison spoke in favor of accepting the proposal. Roger Pickens and James Tatem spoke against acceptance, favoring, instead, continued refusal to accept new appointments until hourly rates were increased to $55 per hour for in-court time and $45 for out-of-court time. After the debate, a voice

[198] JX 8, p. 47, JX 10, pp. 66, 67.

[199] JX 5, p. 50, JX 7, pp. 35, 36, JX 10, pp. 70-72, JX 11, pp. 50-55, JX 12, pp. 85, 86, JX 13, pp. 105-109, 160, 161; Koskoff 831, 832.

vote was taken. Those in favor of accepting the Mayor's proposal prevailed. The vote was then communicated by Koskoff to Councilmember Rolark's office by the 1:00 p.m. deadline set by Council Chairman Clarke.

67. At 2:00 p.m. on September 19, 1983, a meeting of the D.C. City Council's Judiciary Committee was convened.[200] The Committee reported out Bill No. 5-128. The bill, and a Committee Report, prepared by Councilmember Rolark, were both unanimously approved by the Judiciary Committee, and forwarded to the D.C. Council for consideration at its September 20 meeting.

68. At the September 20, 1983, meeting of the D.C. City Council, Council Chairman Clarke suspended the rules for consideration on an emergency basis of Bill No. 5-128. The bill was passed unanimously by voice vote.[201]

69. On September 21, 1983, the CJA regulars resumed calling in to accept new appointments.[202]

70. Respondents' argument that the CJA lawyers lacked the power to create a court emergency and thereby force the District government into passing Bill No. 5-128 is contradicted by the entire record. The best proof of the power of the CJA lawyers lies in the fact that the boycott succeeded. Moreover, the claim of relative weakness of the CJA lawyers is totally inconsis-

[200] Koskoff 832.

[201] CX 35C. The permanent form of the bill was passed on October 4, and both versions were signed by the Mayor on October 11, 1983. CX 35A-C; RX 150A, B. After passage of the permanent bill, Councilmember Rolark fulfilled her commitment to the CJA lawyers (see Finding 65) by introducing a bill to raise the rate to the $45/$55 level. RX 177A-D.

[202] JX 13, p. 71; RX 149A-J.

tent with respondents' own voluminous evidence proving the vital role played by CJA lawyers in the District's criminal justice system.[203] Perhaps even more significant is the fact that District officials (PDS Director, Mayor, Chief Judge, Councilmembers) must have realized (as the record plainly shows) that the use of emergency alternatives to the CJA lawyers – voluntary or compulsory pro bono from the uptown bar, increased use of law students, or expanded PDS – constituted no meaningful restraint on the power of the CJA lawyers. As a matter of fact, the SCTLA leadership themselves had argued that since uptown lawyers had no real intention of permanently replacing them, a temporary stint downtown in the criminal justice system would accomplish nothing.[204] Certainly no long-term alternative to the CJA lawyers would have solved the emergency situation; besides, the District government had no reason to believe that there was readily available a viable long-term alternative to its mixed system, and without such alternatives, the role of the CJA lawyers as an essential component of the existing system was manifest.[205]

J. ***The Effects Of The Boycott***

71. The cost of the boycott to the District will be approximately $3 to $5 million a year in additional CJA expenditures.[206] The District's total annual budget is almost $2 billion.[207]

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[203] See Finding 19.

[205] JX 12, pp. 38, 39, 105.

[205] See Finding 21.

[207] JX 1, ¶ 46(f); CX's 36W, 38D. An increase of this size was described by PDS Director Carter as a "very modest investment" when viewed "in the context of the absence of any intervening adjustments over more than a decade." CX 31B, C.

[207] JX 1, ¶ 48.

72. In addition to higher costs for the city, the immediate impact of the boycott on the criminal justice system has been a sharp increase in the number of lawyers willing to take on CJA cases because of the higher fee schedule.[208] There is some speculation in the record that at the increased fees experienced lawyers will be encouraged to continue CJA work for a longer period of time, court administrators will have a greater choice among lawyers willing to do CJA work thereby opening up the possibility of a quality certification program, reduced caseloads made possible by the rate increase will result in more aggressive representation of clients, and that some CJA lawyers may now be able to afford office space and the other amenities of a professional practice.[209] The record, however, suggests that these sanguine predictions must be tempered with the realization that criminal law itself tends to burn out all but the most monetarily successful, and that a dramatic transformation in the quality of indigency practice is unlikely.[210] Perhaps all that can reasonably be expected from the modest boycott-inspired fee increase is that the more dedicated CJA practitioners will have an incentive to continue their work by some indefinite margin beyond the point when it would otherwise end.

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[208] JX 2, p. 85; RX's 163A-168B; Carter 255, 256, 260, Robinson 356, 357, Perrotta 677, 743, 744, Koskoff 836, 837, 858.

[209] JX 2, pp. 87, 89, JX 3, p. 205, JX 5, p. 61, JX 6, pp. 69, 70, JX 8, pp. 80, 81, JX 10, pp. 79-81, JX 11, pp. 122, 123; Perrotta 677, 726, 728, 729, 732-736, Koskoff 837, 838, Addison 887, 888, Hazard 1153, 1154, Lefstein 1539, 1540. The perception of experts is that the District's mixed system suffers from the absence of any effective quality control in the certification and assignment of CJA lawyers. Hazard 1168-1171. See also CX 231A-D, for the certification recommendations of the Braman Committee.

[210] CX 80E; RX 80A, B; Slaight 958, 959, Lefstein 1511.

This is no small achievement. As one seasoned observer of the field has noted–

> A defense lawyer must expect to lose more cases than he wins, generally not for reasons related to his legal capabilities, but because most defendants whose cases are not dismissed early in the process are ultimately convicted. Men with enough dedication and self-assurance to accept repeated defeats without coming to doubt the value of their efforts are no easier to find in the bar than anywhere else. All but the most eminent criminal lawyers are bound to spend much of their time in overcrowded, physically unpleasant courts, generally dealing with people who are educationally, economically, and socially underprivileged. It is not the sort of working environment that most professional men choose.[211]

[211] RX 28N. See RX 55T for the enervating experience of uptown lawyers drafted to defend indigents in 1974. See also JX 2, pp. 49-51, JX 10, pp. 100, 101, 124, 125, JX 13, pp. 23, 24 for accounts of some of the more frustrating aspects of criminal law practice (uncompensated waiting periods and the pressure of arranging the logistics of appearances scheduled in some 43 courtrooms) and JX 7, pp. 22, 23, JX 9; p. 47 for a description of the depressing physical surroundings in which CJA law is practiced.

III

DISCUSSION

The District of Columbia's CJA lawyers, some 100 private practitioners regularly representing indigents in criminal cases before Superior Court, agree that they will not take additional cases unless their fees are raised. The Commission's complaint challenging this concerted action as an illegal boycott under Section 5 of the Federal Trade Commission Act raises three issues: Is the boycott totally exempt from the antitrust laws? Is it a per se violation? Or should the boycott be considered under a rule of reason analysis that takes into account the proferred justifications and the actual effects of the actions?[212]

Turning first to the defenses, respondents contend that the antitrust laws never enter the picture at all because the boycott was a form of political action protected by the First Amendment. Respondents also maintain that even if the boycott does not qualify as protected political action, it was nevertheless a form of petitioning for legislative change (i.e., a statutory increase in fees) exempt from the antitrust laws under the *Noerr-Pennington* doctrine. Finally, respondents argue

[212] Throughout this discussion I have used the term "boycott" to describe respondents' action although in standard antitrust usage a boycott is a concerted refusal to deal aimed at driving a competitor from the market. The term, however, has been expanded to cover a concerted refusal to deal for the purpose of increasing prices and I use it in this broader sense, as the Commission did in *Michigan State Medical Society*, 101 F.T.C. 191 287 (1983). *See also St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 at 541 (1978) ("The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.").

that the public welfare motivation for the boycott – the concern of CJA lawyers that the Sixth Amendment rights of their indigent clients might not be protected adequately unless CJA rates were raised – amounts to a cognizable justification under a rule of reason analysis applicable to the professions.[213]

On the question of political action in the form of a boycott, the Supreme Court recently held in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) that the First Amendment rights of speech, assembly, association, and petition, served to immunize from antitrust liability the peaceful aspects of an NAACP-inspired boycott of the white merchants of Port Gibson and Claiborne County, Mississippi. The boycott was imposed after the NAACP's list of "Demands for Racial Justice" was received with indifference by city and county officials. Starting from the premise that the "right of

[213] Respondents also assert that SCTLA is too amorphorus an organization to be subjected to FTC jurisdiction or an FTC cease and desist order. Although SCTLA is loosely organized and its membership is hard to pin down, the role of this organization in the September boycott can hardly be gainsaid. Its meetings in the Lawyers' Lounge of Superior Court were the rallying point for the boycott, and its officials were the leaders of this action. To suggest that SCTLA's failure to adhere strictly to Robert's Rules, or its casual attitude toward the collection of dues, or the fact that its meetings are not held in more elegant surroundings, somehow presents a jurisdictional bar to the Commission, would gratuitiously engraft a proviso onto Section 4 of the Federal Trade Commission Act without the support of a single cited authority. SCTLA, an unincorporated association, was organized for the profit of its members (*see, e.g., American Medical Assoc.*, 94 F.T.C. 701, *aff'd*, 638 F.2d 443 (2d Cir.), *aff'd mem.* 455 U.S. 676 (1982)) and since its activities are in or affect commerce in the District of Columbia, it is subject to the Commission's jurisdiction. If an order were appropriate, it could be enforced against SCTLA.

business entities to 'associate' to suppress competition may be curtailed" (*id.* at 912), the Court applied a motive test in distinguishing between such parochially-minded economic conduct and what it characterized as the NAACP's "political activity". *Id.* at 913. As for the impact of the boycott, the Court reasoned that since the *Noerr-Pennington* doctrine affords First Amendment protection, irrespective of motive or effect, to a petition filed for the economic purpose of fostering anticompetitive legislation, then it necessarily follows that a politically motivated boycott – characterized by the Court as a form of petition qualifying for similar First Amendment consideration – must also be exempt from the antitrust laws even though the NAACP "[L]ike the railroads in *Noerr* . . . foresaw – and directly intended – that [the object of the boycott] would sustain economic injury as a result of their campaign." *Id.*[214]

[214] In *Eastern R. Conf.* v. *Noerr Motors*, 365 U.S. 127 (1961) the railroads and their public relations firm mounted an advertising campaign designed to foster the adoption of laws restricting the ability of the trucking industry to haul heavy freight over long distances. Even though this effort was marked by misrepresentation and severely impacted on the truckers, the Supreme Court held that the Sherman Act was not intended to regulate joint activity directed toward informing the government, and to impute such a purpose to the antitrust laws would raise serious constitutional questions under the First Amendment. *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965) involved a lobbying campaign by the union and large coal mine operators intended to persuade the Secretary of Labor to establish wage rates that would impact adversely on small mines. In holding that the lobbying activity was protected by *Noerr*, the Supreme Court separated the underlying illegal conspiracy between the union and the operators from their rights to engage in joint petitioning. The constitutional basis of the *Noerr-Pennington* exception, which was left uncertain in the earlier decision, was clarified in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

Although *Claiborne* borrows freely from *Noerr-Pennington* on the issue of economic effect, it creates a discrete barrier to the "political action" defense. By its terms, *Claiborne* may be invoked only when the boycott is politically motivated since it is only in that special context that the Court treats the communicative aspects of a boycott as a form of petitioning or constitutionally protected expressive speech.[215] If the action is not politically motivated, there is nothing in *Claiborne* that expands on what *Noerr-Pennington* allows businessmen or professionals to do in the way of a joint effort to persuade government. In other words, both before and after *Claiborne*, *Noerr-Pennington* applies only to certain tactics used to influence legislative or administrative decisions: standard, noncoercive forms of petitioning or lobbying such as speech, advertising, and the distribution of literature. Thus the *Noerr* Court explicitly

[215] The Court does not spell out in detail why a politically motivated trade restraint in the form of a boycott should receive this special antitrust exemption except to observe that the expression of opinion on controversial public affairs issues has always been placed so high in the hierarchy of First Amendment values that we accept the notion that there should be little restriction on how these issues are debated. *Claiborne*, 458 U.S. 913. Consistent with this view, the Court cites with approval *Missouri* v. *NOW*, 620 F.2d 1301 (8th Cir.) *cert. denied*, 449 U.S. 842 (1980), but it does so only for the narrow proposition that the right of petition is so important that even when exercised by way of a boycott, it is not subject to state tort law. *Claiborne*, 458 U.S. 886, 914, n. 48. By its limited use of *NOW*, the court implicitly cautions against acceptance of the Eighth Circuit's conclusion that a politically motivated boycott (there, a NOW hotel and convention boycott designed to pressure Missouri into adopting ERA) is exempt because neither the legislative history of the Sherman Act nor the cases interpreting the legislative history reveal that Congress intended to prohibit a restraint undertaken for such a purpose.

held that the doctrine does not exempt "the use of such devices as . . . boycotts . . ." 365 U.S. at 136,[216] and this restriction is not modified by *Claiborne*, except, of course, in the case of politically motivated action.

Respondent's attempt to show that the CJA boycott meets the strict limitations set out above and therefore qualifies as either exempt political action under *Claiborne* or as an immune petition under *Noerr-Pennington* is similar to the defense raised and rejected in *Michigan State Medical Society*, 101 F.T.C. 191 (1983) [hereinafter *MSMS*]. In *MSMS*, the Commission held that a threat by an association representing 80 percent of Michigan doctors to withdraw services unless Blue Cross/Blue Shield fee schedules were revised and state Medicaid cuts were restored, went beyond petitioning protected by the *Noerr-Pennington*, and because such threats directly interfered with competitive relationships among the doctors themselves and between the doctors and the third party payers, it was not exempt as a politically motivated action under *Claiborne*. The Commission thus clearly signaled in *MSMS* that it intends to limit sharply the availability of both the "petitioning" and "political action" defenses, and that any coercive combination of suppliers aimed at what it called the "combination process" (101 F.T.C at 300, 301) will be distinguished from both a permissible political boycott and a permissible communicative petition with the result that it will receive neither *Claiborne* nor *Noerr-Pennington* immunity.

Faced with *MSMS*'s narrow interpretation of the application of *Claiborne* and *Noerr-Pennington*,

[216] *See also* 365 U.S. at 142 ("There are no specific findings that [the railroads] attempted directly to persuade anyone not to deal with the [truckers]").

respondents maintain that its 1983 boycott was indeed "political" and not within the "competitive process" language of *MSMS* because CJA rates are not set by head-to-head competition among CJA lawyers, but are established instead by legislation mandating a uniform rate for all CJA lawyers. The difficulty with this argument is that in *MSMS* the Commission did not equate the term "competitive process" with direct competition. For irrespective of the vigor of the head-to-head contest among Michigan doctors, the Commission indicated that it was a concerned in *MSMS* with competition in a larger sense: a marketplace confrontation in which price is set not by dealings between individual doctor and patient, but by negotiations between associations of doctors and either third party insurers or the government acting as surrogates for the patient population. The Commission invoked Section 5 because it did not want to see relative power in this kind of special market distorted by the use of a coercive tactic that might levy otherwise unjustified costs.

Furthermore, under the Commission's treatment of *Claiborne* in *MSMS*, if a coercive tactic is applied to the "competitive process", it does not become an expressive political petition merely because the boycotters are convinced that as a disfavored group (say, lawyers representing another disfavored group, indigent criminals) they could not communicate effectively the connection between their own economic well-being and a political objective. In drawing a sharp line of demarcation at where it will recognize the political action rubric (or if you will the expressive petition concept) the Commission, in effect, said that for purposes of granting or denying a total antitrust exemption, neither label will apply if, in the context of a buyer-seller confrontation, professionals combine for the purpose of economic

gain, irrespective of any ancillary connection between this economic objective and some difficult to achieve but laudable political goal.[217]

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[217] If there is no interference with the "competitive process" (i.e., a marketplace relationship between buyer and seller does not exist) the Commission intimates in *MSMS* that it may allow the political defense even if the coercive tactics aim for a political objective that translates into direct economic gain. This appears to be the basis for the distinction drawn in *MSMS* between the Michigan doctors' threat of a boycott from the actual boycott in *Crown Central Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980). In *Crown Central*, gas station operators agreed not to sell gasoline to consumers in order to pressure the Department of Energy into raising the retail price ceiling. Applying a balancing test to the dealers' boycott, the district court held that since the action was not aimed at competition in any sense, and represented the only effective way for the gasoline dealers to exercise their First Amendment right to bring their views to the government's attention, the conduct was a permissible form of joint political expression protected by *Noerr-Pennington*. The importance of *Crown Central* as precedent was diminished, however, when a contrary result was reached in *Osborne* v. *Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553 (D.Del. 1980). There the district court held that dealers' boycott aimed at the Department of Energy was joint political activity, but it was not exempt since *United States* v. *O'Brien*, 391 U.S. 367 (1968) allows for regulation of even manifestly political activity–

> . . . if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

While a decision on the obvious tensions between *Crown Central* and *Osborne* and resolution of the apparent conflict between *Claiborne* and *O'Brien* might define more precisely the bounds of permissible political activity, *MSMS* says in no uncertain terms

As for the *Noerr-Pennington* doctrine, contrary to respondents' argument, I see nothing in the Commission's decision in *MSMS* suggesting that its availability will turn on whether price is eventually set by legislation, as is the case here (and in *Noerr*) or by negotiation with an administrator who is delegated by statute with the right to make pricing decision, as in the Michigan doctors case (and in *Pennington*). In either instance, all that is exempt under *Noerr-Pennington* is the right to petition – that is, to make one's views known – which not only is protected by the First Amendment, but also is encouraged by the public policy favoring the free flow of information to the government. But as the Commission indicated in *MSMS*, this communicative function of petitioning is isolated by *Noerr-Pennington* from any underlying boycott, which must then stand on its own when tested under the antitrust laws.[218]

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that the Commission will now allow the political label to be used once there is any form of "competition", broadly defined as a marketplace confrontation, which includes government as a buyer of services provided by a profession.

[218] *See also Feminist Women's Health Center* v. *Mohammad*, 586 F.2d 530 (5th Cir.), *cert. denied*, 444 U.S. 924 (1979) (letters from a hospital medical staff and medical societies reporting to the state board of medical examiners alleged inadequacies in the post-operative procedures of an abortion clinic receive antitrust immunity under *Noerr-Pennington*, but any underlying conspiracy to eliminate the clinic by use of coercion is subject to antitrust scrutiny). Complaint counsel seem to be arguing at times that even apart from the use of a coercive tactic, there may have been an illegal agreement here when the leadership of SCTLA convened meetings at which there was discussion about the appropriate fee level to be included in proposed legislation – $35 or $45 or some higher amount. Given the fact that all CJA lawyers are paid uniform fees as determined by statute, and that CJA lawyers, like any other interest group, have a right to petition for favorable

In addition to the claim that the boycott should receive a total constitutional exemption on the basis of *Claiborne* and *Noerr-Pennington*, respondents also submit that they are entitled to immunity on the grounds that a fee increase is directly related to their status as professionals who have the responsibility of protecting the Sixth Amendment rights of their indigent clients. This is simply a restatement of the argument that professional status alone merits a total antitrust exemption, a defense that should have been laid to rest after *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) where the Court said flatly that irrespective of its public-service aspects, the practice of law is a business, as demonstrated most pointedly in conduct directed at fees – the very issue involved here and in *Goldfarb*. But while *Goldfarb* plainly means that respondents are entitled to no blanket exception from the antitrust laws on the grounds that the CJA segment of the legal professional performs a useful or even a constitutionally-mandated function advanced by the boycott, this seminal opinion also suggests that the special public service role of the professions may justify a departure

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legislation, I doubt that such a theory could survive the constitutional exemption of *Noerr-Pennington*. As for the line of cases that suggest that *Noerr-Pennington* may not apply at all if there is a commercial relationship between government and a seller claiming the exemption, this limitation has only been invoked when the so-called "petition" was in the form of a rigged big or similar price-fixing device. *See, e.g, George R. Whitten, Inc.*, v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). In any event, as I read the complaint it does not challenge the right of commonly-affected lawyers to forge a position and then to urge a city to adopt it. The issue here is the antitrust consequences of going beyond mere petitioning to the point that joint action not covered by *Noerr-Pennington* (a boycott) is used.

from black letter antitrust law, including rules relating to boycotts. In its now famous footnote 17, the Court said:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether the particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspects, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.[219]

The fleshing out of the cautionary language cited above began in *Goldfarb* itself where notwithstanding footnote 17 the Court treated the questioned practice – a county bar association's minimum fee schedule for title examination – as price-fixing and per se illegal. The Virginia lawyers essentially sought an immunity from antitrust regulation based solely on their status as a learned profession, and any arguments that may have been made about the public service aspects of the profession were obviously lost in defense of a title search, part and parcel of a standard commercial transaction.

That footnote 17 was more than a gloss became evident, however, in subsequent cases in which the Supreme Court has demonstrated a reluctance to ex-

[219] 421 U.S. at 788-89, n. 17.

clude public interest considerations in evaluating professional restraints. This trend can be seen, for example, in *Nat. Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). Citing to footnote 17, the Court raised the possibility that "ethical norms" (an undefined term) may be justified under a rule of reason approach (*id.* at 696), but rejected as "grossly overbroad" (*id.* at 699-700 (Blackman, J., concurring)) the notion that any competitive bidding would so tempt the engineers to ignore safety factors that a total exemption from the antitrust laws was in order. The Court would not accept such a "frontal assault" on the basic policy of the Sherman Act since it rested on the vague premise that any competition was a potential threat to public safety. *Id.* at 695. What *Professional Engineers* did not answer is how the Court would treat an "ethical norm", which had a marginal impact on competition, was shown by past history (say, a record of collapsing buildings and bridges) to be justified, and was rationally tailored to meet such a proven need.

Following *Professional Engineers*, the possible availability of a public interest exemption for the professions suggested by footnote 17 was again signalled in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 322 (1982). There the Court held that a doctors' maximum fee schedule built into a health insurance plan was per se illegal since the maximum fee might tend to become the minimum. But the continued viability of footnote 17 was immediately reaffirmed as the Court noted that "[t]he respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint." *Id.* at 349. Thus notwithstanding its previous rejection of

"quality of professional service" justifications in *Goldfarb* and *Professional Engineers*, the Court went out of its way in *Maricopa* to establish the possible availability of just such a defense in the proper case.

Taken together, *Goldfarb*, *Professional Engineers*, and *Maricopa* can be read as saying that while the professions will receive no blanket antitrust immunity for practices resembling illegal commercial activity, the special public service aspects of the professions may require some caution in applying per se rules, and under certain circumstances, policy considerations may excuse the restraint entirely. In *MSMS*, still another caveat was added by the Commission: in treating restraints in professional areas where the Commission has had little previous experience, the per se rules, which exclude even the proffer of a justification, should be applied with special care. The Commission then went on in *MSMS* to grapple with the problem inherent in footnote 17 of evaluating the adequacy of the justification proffered. Respecting the pressure on Blue Cross/Blue Shield, the respondents apparently wanted the Commission to mediate the bitterly conflicting claims of the doctors and the Blues and decide whether fee schedules should in fact have been adjusted upward. If an increase was in order (a point heatedly denied by the insurers) then presumably the boycott was justified. The Commission refused to become embroiled in this controversy, and thus rejected out-of-hand the notion that an FTC proceeding is the proper forum for resolving disputes over the adequacy of fees. As for the threatened boycott of state Medicaid, the doctors claimed that unless Medicaid payments were increased the field would be left to disreputable "Medical Mills." The Commission did not treat at length with this argument except to note that the doctors could have exercised their rights of petition under *Noerr-Pennington* and brought their views before the Michigan legislature without resorting to collective threats. In all, the justifications advanced in *MSMS* were characterized by the Commission as "either very weak or non-existent". 101 F.T.C. at 296.

How far the Commission would have allowed the doctors to go in the way of showing a justification is not made clear in *MSMS* and is a bone of contention between the parties here. Complaint counsel argue that footnote 17 and its progeny were interpreted by the Commission as meaning that the only justification allowable is evidence relating to procompetitive "efficiencies"—that is, whether the concerted activity enhanced competition by injecting new forms of competition, reducing entry barriers, or facilitating or broadening consumer choice. While complaint counsel are correct that these points are stressed, the Commission did not exclude quality and patient care argument. It merely stated that on the facts of this case such argument could have been made by means short of a boycott. 101 F.T.C. at 294-95. More importantly, complaint counsel's interpretation of *MSMS* would tend to diminish the actual language of footnote 17 since the Court spoke there of "the public service aspects" of the professions—a much broader perspective than the "enhancement of competition" test pressed by complaint counsel. In short, the Court in *Goldfarb* seems to recognize that there may be special problems of public policy properly within the concern of the professions, and that these problems need not be shunted aside in total deference to the economist's perception of efficiencies.

Some insight into what the *Goldfarb* Court may have had in mind in the way of justification was provided in *Wilk* v. *American Medical Ass'n*, 719 F.2d 207 (7th Cir.), *cert. denied*, 104 S. Ct. 2399 (1984), a case involving concerted activity by doctors aimed at limiting the hospital privileges of chiropractors. The Seventh Circuit, applying the rationale of footnote 17, concluded that under a rule of reason analysis it would allow the doctors to show (1) that the action was motivated by a genuine concern for patient care, (2) that this concern is objectively reasonable, (3) that the concern was the dominant motivating factor behind the action, and (4) that this concern for patient care could not have been adequately satisfied in a manner less restrictive of competition. *Id.* at 227.

There is nothing in *Wilk*, *Maricopa*, *Professional Engineers* or *Goldfarb*, however, which even hints at expanding the rule of reason to accommodate the kind of "quality of care" justification advanced here by respondents – namely, that a group of professionals should be allowed to engage in collective activity so that they may increase their fees up to a level that permits them to serve their clients better. In *Wilk*, for example, the doctors did not argue that chiropractors had to be excluded from hospitals so that medical fees could be increased. By the same token, in *Maricopa* the majority and the dissent did not part company over a possible connection between the income level of Arizona practitioners and better care for the hospitalized: the issue there was whether the Court should look behind the questioned plan to determine if it might serve the interests of patients as a cost containing alternative to existing health insurance. Only in *Professional Engineers* do we see a defense in an antitrust case that even comes

close to the one advanced here by the CJA lawyers – a restraint imposed for the purpose of obtaining or protecting a so-called reasonable level of professional income should receive antitrust immunity because the public will suffer if the engineers suffer. The Court gave short shrift to this "frontal assault" on the antitrust laws, and there is no reason to expect that it would be any more receptive to an antitrust defense grounded, for example, on the notion that what's good for the county bar is good for the rest of the county, or any variation thereof requiring (a) a suspension in belief about the prevalance of selfless group pricing decisions, and (b) a willingness (or the wherewithal) to determine the reasonableness of a particular price.[220]

Up to this point I have dealt solely with the adequacy of the exemptions and the justifications advanced by respondents. For the reasons given above, I believe that they would all fail to pass antitrust muster. Arguably, this matter should then be disposed of by invoking *MSMS'* modified per se rule without further investiga-

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[220] A recent decision heavily relied upon by respondents, *Kreuzer* v. *American Academy of Periodonotology (sic)*, 5 Trade Reg. Rep. (CCH) ¶ 66,029 (D.C. Cir. 1984) had nothing to do with increasing fees to a reasonable level so that professionals might improve "quality of care." On the contrary, *Kreuzer*, like *Wilk*, strongly suggests that the rationale of footnote 17 will have no application when the economic self-interest of the profession is apparent, and that it will be confined instead to the context of self-regulation, restrictive membership rules, or other technical requirement directed toward a legitimate patient care purpose. Thus in *Kreuzer* the issue was whether a limited practice requirement for membership in an association of dental specialists (i.e., certified periodontists could not practice periodontal prosthesis), which at least ostensibly was unrelated to the members' own economic interests, served to improve patient care by assuring a high level of periodontic skill.

tion of effects or market power. But given the Commission's total lack of institutional experience in dealing with the constitutional, political, and social pressures permeating the criminal justice field, I was persuaded in the trial of this matter to allow respondents to make a full record so that both the trier of the facts and the reviewing authorities might have before them any special circumstances surrounding a boycott in this unfamiliar area.[221]

What the record shows is that the level of CJA fees is the end result of a legislative process that reflects, among other things, the low regard by the public for the constituency involved (indigent criminals and their lawyers), an assessment of what will satisfy the constitutional requirement for effective representation, the lofty sentiment that all lawyers owe a professional obligation to represent indigents, the budgetary pressures of conficting priorities, and whatever influence the CJA lawyers can bring to bear in support of

[221] I also find some support for this approach in *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) where the per se price-fixing label was withheld from a form of boycott – a concerted refusal to license individual music compositions and the use instead of a "blanket license". The Court indicated that the background facts – the development of the blanket license in response to a market embracing thousands of users, a host of copyright owners, and millions of compositions – require a discriminating examination of the putative restraint under a rule of reason analysis. Similarly, in *NCAA* v. *Board of Regents*, 52 U.S.L.W. 4928 (June 27, 1984), the Court held that where an unconventional market is involved (there athletic competition requiring a balance of power among market participants) the per se rule against output restrictions, which might otherwise apply to an NCAA limitation on the number of football games member colleges could telecast, should be suspended in favor of a rule of reason approach that weighs actual adverse effects.

their demands for higher fees. These factors have nothing to do with ordinary market forces in the sense that there is an expectation on the part of the buyer (the D.C. government) that rates will be affected by any meaningful competition among CJA lawyers. On the other hand, ordinarily there is also no expectation by the buyer that the mechanism for setting price, which here happens to be legislative, will be disrupted by the imposition of coercion by the sellers (the CJA lawyers) in the form of a boycott.

As for the effect of the boycott, certainly once it was imposed it was successful in accomplishing what it set out to do – to force an increase in the fees of CJA lawyers by creating an emergency and thus putting pressure on the District government to pass the required legislation. But it was a singularly curious form of coercion. For the record also shows that the boycott was not vigorously opposed by the Mayor who believed that an increase was fully merited but could not be brought about unless the city was confronted with an actual emergency demonstrating the importance of the CJA lawyers to the administration of the criminal justice system.[222] (The Mayor was hardly alone in his view that an increase was justified; as far as this record will allow, every expert who had studied the problem had concluded that the pre-boycott rates, which had not been adjusted for over 10 years, were woefully inadequate.)

[222] The ambivalent role played by the District government in the events surrounding the CJA rate increase may explain its failure to invoke the city's own antitrust laws (JX 14C, ¶ 4; CX 240A-L), as well as the conspicuous absence of District officials as supporters of the complaint. This cool reaction by those most directly affected stands in marked contrast to the vigorous state opposition elsewhere to boycotts organized by professional groups for the purpose of securing favorable legislation. *See, e.g., New York* v. *Roth*, 1979-2 Trade Cases ¶ 62,828 (Nassau County Ct. 1979).

In summary, under *MSMS* the professionals who sell legal services to the city receive no blanket "political action" or "petitioning" antitrust exemptions or access to special "quality of care" justifications when they act in concert in order to obtain higher fees. And if the city had not been so supportive of the boycotters' demands (or to put it somewhat differently, if the identity of the victim was not so elusive) I have little doubt that an order would be appropriate. However, when the seller's action is accomplished by the buyer's knowing wink, this suggests that presumption about the way free markets work and the inevitable adverse effects flowing from this kind of concerted activity should be saved for another day – perhaps one when the buyer is more determined to deal at arm's length with the seller over the adequacy of compensation paid for an essential service.

In reaching the conclusion that the Commission should depart here from the strong authority of *MSMS* on the narrowest possible antitrust grounds – no adverse effects in the special circumstances of the 1983 boycott – I necessarily assume, as I have emphasized throughout this discussion, that on the basis of *MSMS* all of respondents' proferred justifications and claimed exceptions, including those grounded on the political action defense, would be rejected if tested solely within the four corners of the Commission's earlier opinion. But while *MSMS* is clearly binding on an ALJ, I am constrained to point out that the Commission's handling of the constitutional problem raised by *Claiborne* – i.e., the Commission's bright line separation of politically motivated action from coercion directed at the "competitive process" – assumes a purity of purpose that may not reflect the actual mixed motivation of lawyers for the indigent. As it happens, the record here lends itself

to more than just a colorable claim of strong political motivation even though the immediate objective of the boycott was a fee increase. Thus the record shows that the CJA lawyers sincerely believed that protection of the constitutional rights of their clients was directly related to reducing caseloads, which, in turn, was a function of a rate change. But even more important is the evidence indicating that city officials (and practically everyone else concerned with the criminal justice system) were convinced in 1983 that (a) the optimal economic price was inadequate to satisfy the "political" (i.e., constitutional) requirement of effective representation, and (b) the CJA lawyers were unlikely to achieve higher fees if they continued to rely on communicative political petitioning alone. The perceptions of these local officials (whose judgment is not easily susceptible to second-guessing since they not only must provide for equal justice under law, but also must pay for it) would seem to argue strongly against pressing for an unnecessary and possibly uncertain confrontation between the Commission's antitrust perspective, which would treat this boycott solely in terms of presumed adverse effects upon the competitive process, and broader constitutional principles, which may allow for an expressive demonstration if the political motivation evidence is credible.[223] I see no point in striving resolutely for an antitrust triumph in this sensitive area when this particular case can be disposed of on a more pragmatic basis – there was no harm done.

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[223] *See* Note, *A Market Power Test For Noncommercial Boycotts*, 93 Yale L.J. 523 (1984).

IV

CONCLUSIONS OF LAW

1. The Superior Court Trial Lawyers Association ("SCTLA") is subject to the jurisdiction of the Federal Trade Commission. In addition, the Federal Trade Commission had jurisdiction over the named individual respondents and the subject matter of this complaint.

2. SCTLA, the named individual respondents, as well as the members of SCTLA and other CJA attorneys, put into effect on September 6, 1983, a boycott of Superior Court. This boycott took the form of a concerted refusal to accept new indigency assignments unless the existing fee schedule was raised.

3. Under the holding in *MSMS*, the boycott by SCTLA and the CJA lawyers was not a form of political action protected by *Claiborne*.

4. Under the holding in *MSMS*, the boycott by SCTLA and the CJA lawyers was not political petitioning exempt from the antitrust laws by *Noerr-Pennington*.

5. Since the boycott by SCTLA and the CJA lawyers was designed to improve the economic well-being of the CJA lawyers, it is not within the ambit of the public service caveat for the professions suggested by footnote 17 of *Goldfarb*, notwithstanding the fact that the action was also motivated by a genuine belief among CJA lawyers that their ability to render effective representation to indigent criminal defendants was directly connected to a rate increase.

6. In the context of the special circumstances of this case, it cannot be presumed that the higher costs attributable to the 1983 boycott are adverse effects. On the contrary, the evidence strongly indicates that in this instance the boycott was viewed by city officials as the

only feasible way of getting a rate increase, which was unpopular with the general public but was supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment.

Accordingly, the following Order should be issued.

ORDER

The complaint is dismissed.

/s/ MORTON NEEDELMAN
Morton Needelman
Administrative Law Judge

Dated: October 18, 1984

[THE FIRST AMENDMENT TO THE CONSTITUTION]

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[SECTION 1 OF THE SHERMAN ACT]

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousands dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[SECTION 5(a)(1) OF THE FTC ACT]

Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1) provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

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OPPOSITION

BRIEF

(3)

No. 88-1198

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION,
Petitioner

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Where a group of individuals have engaged in "a boycott [which] served, in part, to make a statement on a matter of public debate," concerning interests besides their own, and where the boycotters were a small proportion of those legally qualified to offer the affected service, does use of the *per se* antitrust rule—"the evidentiary shortcut to antitrust condemnation without proof of market power"—constitute a restraint on political expression that is "greater than is essential to the furtherance of [the government's] interest" in preserving market competition?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Having failed to convince an experienced administrative law judge, a distinguished court of appeals panel,[1] and apparently the Solicitor General[2] that this case involves a simple "price-fixing boycott," the Federal Trade Commission ("FTC") now asks this Court to join it

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[1] The panel included a former Assistant Attorney General in charge of the Antitrust Division, a former Deputy Attorney General of the United States, and a former Chief Judge of the Court of Appeals for the District of Columbia Circuit.

[2] *See* Petition at 1 n.1. The following citation abbreviations are used in this Opposition: "C.A. App." refers to the Joint Appendix filed with the United States Court of Appeals for the District of Columbia Circuit; and "Pet. App." refers to the Appendix to the FTC's Petition.

in casting aside the First Amendment values that the court of appeals so clearly perceived. With its lonely voice, the FTC tells this Court that the "oldest and clearest of antitrust doctrines" is under attack and suggests that those who have failed to perceive the wisdom in the FTC's extraordinary position are guilty of erecting "formidable new barriers to effective antitrust law enforcement at the federal, state, and local levels."[3] The FTC's approach to this factually unusual case is constitutionally blind; its error was carefully dealt with by the court of appeals; and this case does not require further attention by this Court.

The FTC asks this Court to condemn *per se* Respondents' highly publicized 1983 "strike" undertaken in the course of Respondents' struggle to secure legislation to increase the statutory maximum rate of compensation for the legal representation of indigent criminal defendants under the District of Columbia Criminal Justice Act, D.C. Code § 11-2601 *et seq.* (1981) (the "D.C. CJA").[4] Understandably, the FTC's statement of the case fails to place Respondents' activities in the political context in which they arose because, to the FTC, politics are irrelevant. Therefore, it is necessary to trace briefly the relationship between Respondents' activities and the long-running dialogue among the bar and bench, civic leaders, study groups, and the legislative, executive, and judicial branches regarding the proper level of compensation for lawyers taking cases under the D.C. CJA ("CJA lawyers").

1. Even before the D.C. CJA was enacted, it was widely recognized that the reimbursement rates established by its federal progenitor were low.[5] S. Rep. No. 790, 91st

[3] Petition at 8-9.

[4] The D.C. CJA was patterned after the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1970) ("federal CJA").

[5] The rates implemented in 1970 were $20 per hour for out-of-court time and $30 per hour for court time, with a limit of $400 per

Cong., 2d Sess. 14-15 (1970). Justice Powell characterized the federal CJA rates as "generally inadequate" and observed that "the majority of persons willing to accept appointments are the young and inexperienced." *Argersinger v. Hamlin*, 407 U.S. 25, 57 n.21 (1972).

In 1975, one year after D.C. had adopted its own CJA statute incorporating the federal CJA rates, the Report on Criminal Defense Services in the District of Columbia by the Joint Committee of the Judicial Conference of the D.C. Circuit and the District of Columbia Bar (Unified) concluded that the existing rates of compensation for CJA attorneys were inadequate to fulfill the constitutional mandate of effective assistance of counsel. (Pet. App. 5a). The same conclusion was reached in 1982 by the D.C. Bar Court System Study Committee (*id.* at 5a-6a) and by a resolution adopted by the D.C. Bar. (C.A. App. 784-85).

During this period, similar recommendations were being made to increase the rates under the federal CJA. If successful, the increase in rates at the federal level automatically would have authorized an increase in the D.C. rates. These recommendations included resolutions by the Judicial Conference of the United States, the National Association of Former United States Attorneys, and the American Bar Association. (Pet. App. 189a-90a n.161). The Department of Justice also recognized that legislation was needed to increase the federal CJA rates, which had not been changed in over a decade. (C.A. App. 733-35).

2. As of the time of Respondents' challenged "strike," none of these recommendations had borne any fruit. (Pet. App. 76a).[6] The reasons soon became apparent.

misdemeanor and $1,000 per felony, absent extraordinary circumstances. (Pet. App. 4a).

[6] Subsequently, in October 1984, legislation was enacted increasing the federal CJA rates to $60 and $40 for in-court and out-of-

The lawyers lobbying for an increase first met with Chief Judge Moultrie of the Superior Court and Larry Polansky, Executive Officer of the D.C. Courts. Both of them stated privately that they believed the CJA lawyers deserved an increase. (Pet. App. 179a. *See also id.* at 6a). However, the Chief Judge refused to do anything to support it on the ground that he might have to pass on the constitutionality of legislation increasing the D.C. CJA rates. (Pet. App. 6a, 180a). He also told the lawyers that they themselves would have to "generate the political support for it" (Pet. App. 179a) and that they should contact the D.C. government, because it was a city problem, not a court problem. (C.A. App. 207).

The lawyers then sought to meet with the Mayor, but were able at that time to speak only to his Counsel, Herbert Reid. Mr. Reid expressed sympathy for their cause, but sent them back to the D.C. Council and/or the Chief Judge. (Pet. App. 180a). Contacts with Council members and their aides yielded similar results: as one aide put it, "if the Mayor wants you to have it, he can get it." (C.A. App. 252).

3. At this point, advice that the lawyers had earlier received from Wiley Branton, then-Dean of Howard Law School,[7] seemed particularly appropriate. Dean Branton had explained that there was no organized constituency to lobby for the increase, and that the criminal defense bar was not held in high enough regard by the government or the public at large to generate support as long as the cases were being handled and the system was running smoothly. (Pet. App. 181a. *See also id.* at 6a). As Dean Branton later testified:

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court time respectively. (Pet. App. 189a-90a n.161). These rates were significantly above the $35 rate to which the D.C. CJA rates were increased in September 1983.

[7] Dean Branton chaired the D.C. Judicial Nomination Commission and had served on a task force advising the D.C. government on the administration of justice.

> In a nutshell I told them . . . that they were going to have to do something dramatic to attract attention in order to get any relief.
>
> And I probably used an expression, you will have to raise hell about this to attract somebody's attention.

(C.A. App. 410. *See also* Pet. App. 6a, 7a, 181a).

In the course of the meeting, it was mentioned that some CJA lawyers were thinking of a "strike" to draw attention to their plight, and Dean Branton indicated that "it may well have to come to that." (Pet. App. 181a-82a).

4. Hearings were held in June 1983 on a bill introduced by Council Chair Clarke to increase the D.C. CJA compensation. The CJA lawyers lobbied in support of the bill and not a single witness (or written submission) opposed the bill on its merits. (*E.g.*, C.A. App. 381-82. *See also* Pet. App. 182a). It soon became apparent, however, that the hearings were simply a gesture and that there was no political steam behind the bill.[8]

---

[8] As Administrative Law Judge Needleman found:

> [T]here can be no serious question that the pre-boycott efforts of the CJA lawyers had largely failed because indigent criminals and their lawyers are not a politically significant constituency; on the contrary, there is political capital to be made if the rights of the indigent accused are denigrated. (Footnote omitted). This hostility toward criminal defendants generally has a carry-over effect to the funding for the lawers who represent them. (Footnote omitted). Moreover, at a time when all programs must contend for scarce public funds . . . funding for indigency programs may be resisted on the grounds that more aggressive representation by criminal lawyers [made possible by reducing caseloads] is precisely what the community does not want since it may interfere with the efficient processing of bodies through the criminal justice system. (Footnote omitted). (Pet. App. 190a-91a).

Professor Geoffrey Hazard, Director of the American Law Institute, stated it perhaps most succinctly when he testified that asking a legislature to "provide more money for lawyers for muggers,

A number of CJA lawyers concluded that dramatic action thus was necessary to build the requisite public and political support. On August 11, 1983, these lawyers decided on what they called a "strike"—during which they would continue to represent clients on existing matters, but would cease volunteering for new cases—while actively publicizing their concerns in the press and the community. (Pet. App. 8a-9a).

Following the "strike" announcement, but prior to the actual "strike," several of the CJA lawyers met with the Mayor. (Pet. App. 186a). The Mayor made no effort to dissuade the lawyers from striking, stating "[y]ou do what you have to do, and I will do what I have to do." (Pet. App. 187a). He also explained that the District had emergency legislative authority and that "if there is an emergency I will deal with it." (C.A. App. at 507. *See also* Pet. App. 187a).

During the "strike," the CJA lawyers actively sought radio, television, and print media coverage for their efforts and were successful in doing so. The issue dramatized by the "strike" received extensive local television and newspaper coverage, as well as national coverage in such media as the "CBS Morning News," the *New York Times*, and even *The Economist* of London. (*See* C.A. App. 900, 921-22, 954). The coverage was overwhelmingly favorable, including a *Washington Post* editorial (C.A. App. 934) and an op-ed article by former Superior Court Chief Judge Harold Greene. (C.A. App. 946). The CJA lawyers also "actively sought to publicize the boycott by handing out press kits, organizing picket lines, and staging rallies." (Pet. App. 9a). The "strike" also led Chief Judge Moultrie to state publicly for the first time that, although he was opposed to the CJA lawyers' methods of seeking an increase, he supported an increase in rates. (*See id.* at 200a n.192).

[which] is the way it is looked at, and that is a hard bill to sell." (C.A. App. 325). (*See also* Testimony of David Isbell, former President, D.C. Bar (Unified), C.A. App. 394).

5. The "strike" by CJA lawyers commenced on September 6, 1983, and lasted about two weeks. (Pet. App. 9a-11a). It was a peaceful effort. At the time the strike ended, the Public Defender Service ("PDS") had contacted only a fraction of the law firms and lawyers who might have provided assistance (C. A. App. 109-11, 116-18, 311-12), and the court had not exercised its power to order any of the 14,000 members of the bar in private practice (including the hundred or so lawyers who devoted the bulk of their practice to CJA work) to accept appointments. (*Id.* at 127-28, 422-24).[9]

6. On September 15, the Mayor called Respondent Koskoff and requested a meeting that evening with her and Respondents Perrotta and Addison. (Pet. App. 10a). At that meeting, the Mayor congratulated the SCTLA leadership on the success of the "strike" (*id.* at 200a) and explained that since an emergency now existed, the bill now could be passed as emergency legislation. (*Id.* at 10a, 200a). When asked when the lawyers should return to work, the Mayor advised them, as a "civil rights organizer" himself, to do so only *after* the bill had passed. (*Id.* at 201a). Council Chair Clarke then met with the strikers and told them that the Council would pass a bill

[9] As the FTC notes, the PDS Director wrote the Mayor stating that the criminal justice system will reach a "crisis point" in the near future. (Petition at 4). At trial, however, he explained that he wrote the letter to prompt immediate action to secure passage of the bill pending before the Council to increase D.C. CJA rates and that the anticipated crisis was in the context of continuing the status quo, that is, if nothing further was done by the PDS or the court to solicit additional volunteers or order non-volunteers to take appointments. (C.A. App. 119). A prior strike in 1974 ended after more than *two* months (or more than four times longer than the 1983 strike) after the court ordered members of the bar to take appointments. (C.A. App. 422-24).

with a $35 rate as a "take it or leave it proposition" (Pet. App. 10a) and stated that nothing would be passed if the CJA lawyers did not agree to return to work. (*Id.* at 204a). The strikers accepted. (*Id.* at 11a). Shortly thereafter, the D.C. Council unanimously passed the bill increasing the CJA rates to $35 per hour. (*Id.* at 10a-11a). The Mayor signed the bill, and explained publicly that he did so because of his belief in the importance of quality representation for indigent defendants and his belief that passage promoted the administration of justice.[10] Three of the respondents were invited to the signing and to the Mayor's cocktail reception that followed. (*Id.* at 205a). As Sterling Tucker, former D.C. Council Chair, testified, "there is [not] any group in the city that is so powerful that [the] government will bow to them on the basis of coercion alone." (C.A. App. 365). The CJA lawyers did not "get the increase simply because of the [strike] strategy. They got the increase because the government really felt that they deserved it." (*Id.* at 364).

7. The court below, in a 57-page opinion joined (in all respects here relevant) by all members of the panel, determined that, under these circumstances, the "strike" could well have succeeded through the persuasive, expressive element protected by the First Amendment rather than through economic coercion (*see* Pet. App. 46a-47a, 53a-56a) and, therefore, Respondents' conduct should not be condemned *per se* without a "market power" inquiry to determine whether the strike even had the potential to be economically coercive (*Id.* at 47a-51a). No participating member of the court voted to rehear the case *en banc*. (*Id.* at 63a).

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[10] No legislative history and nothing in the record indicates that the D.C. government was coerced by the CJA lawyers' "strike," which was a well-understood lobbying tactic used by many groups in the District of Columbia. (C.A. App. 349-50, 361-62). Neither the Mayor, Chief Judge Moultrie, D.C. Counsel Chair Clarke, nor any member of the D.C. government appeared at the trial to testify that they were the victims of coercion. Nor did the District government invoke the District's own antitrust statute.

REASONS FOR DENYING THE WRIT

1. The FTC's entire petition stands or falls on the proposition that *United States v. Albertini*, 472 U.S. 675 (1985), is on all fours with this case. Plainly it is not.

In *Albertini*, the Court followed a deferential approach to determine whether a regulation was "greater than is essential" to promote the governmental interest in circumstances in which (1) the regulation had been narrowly drawn, (2) it was clear that the regulation was intended to apply to the factual setting before the court,[11] and (3) the court would be improperly forced to act as a regulatory agency in making judgments about the efficacy of the regulation.[12] In contrast, (1) the Sherman Act is potentially very broad, (2) the Act was not clearly intended to apply to these factual circumstances, and (3) the federal courts traditionally have had a broad role in defining the precise scope and purpose of the Act in the context of particular cases.

Albertini dealt with a statute that explicity made illegal all entries onto a military base by a person ordered not to reenter. The Court determined that the statute was specifically intended to apply to the situation (entry on a military base during an "open house" by a barred person) and that the military, not a court, was in the best position to decide how best to maintain the base's security during the open house. *Albertini*, 472 U.S. at 682, 689. Accordingly, with respect to the argument that an absolute bar of entry failed the fourth part of the *O'Brien* test [13] because there were conceivable alternatives

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[11] *Cf. Greene v. McElroy*, 360 U.S. 474, 507 (1959) (without explicit Congressional action, Defense Department had no authority to administer a constitutionally questionable security clearance program).

[12] The Court specifically noted that "[w]e are even less disposed to conclude that *O'Brien* assigns to the judiciary the authority to manage military facilities throughout the Nation." 472 U.S. at 689.

[13] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

to ensure the security of the base, the Court concluded that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 689.

Similarly, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), also cited by the FTC, the Court upheld the United States Park Service's refusal to permit sleeping in certain national parks to illustrate the plight of the homeless. The Court noted that the ban on sleeping was narrowly drawn to serve the government's interest in protecting the parks, and that *O'Brien* does not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Id.* at 299.

In stark contrast, the Sherman Act was cast in broad terms and has always been recognized as requiring extensive judicial elaboration. *See Standard Oil Co. v. United States*, 221 U.S. 1, 51-60 (1911) (discussing the common law origins of Sherman Act jurisprudence). Indeed, the *per se* rule itself is an elaboration by this Court, to facilitate Sherman Act enforcement, rather than an inflexible rule mandated by Congress. *See Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). The Court has been cautious about creating new *per se* prohibitions, *e.g., White Motor Co. v. United States*, 372 U.S. 253 (1963), or applying an established *per se* rule to conduct which does not comfortably fit within the rule's rationale, *e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

Indeed, the most peculiar aspect of the FTC's petition is the distinction it draws in giving recognition to those facts:

> To be sure, this Court has sometimes reinterpreted the Sherman Act to alter the categories of restraints subject to *per se* condemnation. *E.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints). But these changes have always flowed from changes in economic learning about the effect of certain categories of restraints upon competition.

Petition at 13 n.10. The odd proposition put forward by the FTC—that the *per se* rule is sufficiently flexible to accommodate the shifting tides of economic learning, but not the most fundamental values of the freedoms of expression and petition upon which this nation was founded [13]—would be a novel basis on which to exercise this Court's *certiorari* power. Reliance on *Albertini* for this proposition would be particularly strange in light of the Court's recognition in *Albertini* of the general principle that one should first determine "whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id.* at 680, quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

As the Court below recognized, the Sherman Act is plainly capable of such a construction in light of the central role that the concept of "market power" has played in determining the Act's reach.

2. The FTC's petition is an oblique attack on the rationale underlying this Court's decision in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), that the Sherman Act was not intended to regulate the political process. By characterizing the Respondents' conduct as a "price-fixing boycott," and a "naked restraint on price or output," the FTC seeks to

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[13] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' (Citation omitted). . . . '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government'" (citation omitted)).

avoid *any* inquiry into its political context. This simply begs the question. The ability to attract political attention by visible (and even disruptive) conduct is not the same thing as the power to coerce economically. If Respondents lacked market power, they simply could not have achieved their political ends through the exercise of economic coercion. They would have had no ability to do so. The effects of their conduct, then, must have resulted from the persuasive, attention-getting aspects of the "strike," and any success they achieved would have been purely a political success. That kind of persuasion in the context of the legislative process is at the core of what *Noerr* protects.[14] The dramatic withholding of services to attract attention by a small group without market power is, like many forms of picketing, properly treated as political petitioning, and under *Noerr*, as conduct that Congress did not intend to reach in enacting the antitrust laws.

3. The FTC attempts to resolve both the First Amendment and antitrust issues by labels rather than analysis. But, as this Court has instructed, "easy labels do not always supply ready answers." *Broadcast Music*, 441 U.S. at 8. This Court has repeatedly emphasized that the *per se* rule should be reserved for those restraints that "because of their pernicious effect on competition and lack

[14] It must be remembered that, in *Noerr*, the lower courts had recognized that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws," but had held that the railroads' publicity campaign was not protected (1) because it was "malicious" and (2) because the campaign had as one purpose the destruction of the truckers' good will and consequent injury to them in ways unrelated to the passage or enforcement of laws. 365 U.S. at 133, 135. This Court unanimously reversed, noting that "no-holds-barred fights" are "commonplace in the halls of legislative bodies." *Id.* at 144. However much some might deplore (and others—apparently including the putative victims, *see* pp. 6-8, *supra*—might applaud) Respondents' tactics, such distaste does not remove that conduct from the core protection of *Noerr* at least if economic coercion is impossible.

of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.*, 356 U.S. at 5. *See also Business Elec. Corp. v. Sharp Elec. Corp.*, 108 S. Ct. 1515, 1519 (1988). Such a presumption cannot be made, however, in the case of conduct designed to secure legislation by persons who lack market power.

In the first place, far from having "no redeeming virture," political activity—even of a heavy-handed variety —was deemed in *Noerr* to be so fundamental to our system of government that Congress could not have intended, in a law aimed at trade restraints, to restrict it. *Noerr*, 365 U.S. at 140-41. *Cf. Claiborne Hardware*, 458 U.S. 886.[15] Indeed, symbolic supply-disruption has been a staple of political discourse in this country, as far back as the Boston Tea Party and continuing into the television age with outraged farmers pouring their own milk down the drain to protest against government milk price support policy.

Moreover, the presumption of a "pernicious effect on competition" is inappropriate in a market that is solely a function of *political* choices—where there is no "demand" apart from the constitutional command of the Sixth Amendment and the political decisions implementing that command. Because any successful political activity would have shifted out the demand curve, leading

[15] Although *Claiborne Hardware* was not a federal antitrust case as it reached this Court, the Court's reasoning would have applied in antitrust as well as tort. Moreover, the sole reason there was no antitrust issue before this Court was because the Mississippi Supreme Court reversed the trial court's finding of a violation of state antitrust law, observing that this Court "has seen fit to hold boycotts to achieve political ends are not a violation of the Sherman Act," citing *Noerr* and other cases. *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980), *rev'd on other grounds*, 458 U.S. 886 (1982).

to both an increase in price and an *expansion* rather than a restriction of output (just as occurred here), it is improper to condemn Respondents' conduct without considering whether they even *could* exercise any economic coercion.[16]

4. The FTC proposes a parade of horribles that could flow from the decision below. The FTC presented the same argument to the D.C. Circuit, which responded:

> [O]ur determination that the SCTLA boycott contained an element of protected expression is not based simply on the [Respondents'] claim that they needed to engage in the boycott in order to communicate effectively; instead, it is based on the "factual context and environment" in which the boycott was undertaken, including the [Respondents'] active efforts to appeal to the public for support of their demand for a raise. In this regard, their boycott was like the "strike" they called it.

(Pet. App. 50a. *See also id.* at 46a-47a).

5. It is, in any event, difficult to see how enforcement of the antitrust laws, or the continued validity of the *per se* rule, could be placed in jeopardy by a decision declining to condemn *per se* a "strike" so clearly part of a political dialogue—by lawyers who knew that both *they*

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[16] The FTC argues that the 100 or so "CJA regulars" (out of over 14,000 members of the D.C. Bar in private practice) must have had market power because they constituted the large majority of the lawyers who made a regular practice of representing indigent defendants under the CJA. (Petition at 15-16.) The notion that such a small group, willing to work for low wages, had market power is akin to the suggestion rejected in *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 621-22 (1977) (*"Fortner II"*), that market power could be shown by "a willingness to provide cheap financing in order to sell expensive houses." *Cf. Argersinger*, 407 U.S. at 57 n.21. Indeed, the undisputed testimony shows that the number of lawyers volunteering to take CJA cases increased dramatically after CJA rates were increased versus the pre-strike period. (C.A. App. 140, 143, 160-61, 201-02).

and the other 14,000 active members of the D.C. Bar in private practice could be ordered to take cases at any time by the D.C. Superior Court, as happened just ten years earlier for over two months. (C.A. App. 125-30, 310, 315-17, 330, 332-33, 342, 373, 422-36, 451-52).

6. This is a factually unusual antitrust case. Justice Stewart's celebrated statement about pornography is relevant here: "I know it when I see it, and [this] is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This Court knows a classic "price-fixing conspiracy" or a "coercive boycott" when it sees one and this is not it. Respondents' conduct does not involve competitors setting their own prices. *E.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). It does not involve secrecy, *e.g., Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), or coercion, *Fashion Originators' Guild, Inc. of America v. FTC*, 312 U.S. 457 (1941). It does not even involve routine government procurement decisions, *e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), but rather a legislatively-set price dictated by the political dynamics surrounding the criminal justice system in the District of Columbia. The goals of the "conspiracy" were generally supported by the political leadership of its supposed "victim" (the D.C. Government). To condemn the Respondents' "strike" as if it were a classic pernicious conspiracy would be to introduce an alarming inflexibility into both the Sherman Act jurisprudence and the First Amendment's protection of political speech.

CONCLUSION

For the foregoing reasons, the FTC's petition for a writ of certiorari should be denied.

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REPLY

BRIEF

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No. 88-1198 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

The Opposition ("Opp.") filed by the Superior Court Trial Lawyers Association ("SCTLA") provides scant grounds for confidence either that the court of appeals' decision to reverse the Commission was correct or that its harmful effects on antitrust enforcement can be narrowly confined. For both these reasons, review by this Court is needed.[1]

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[1] Seeking to divert attention from the merits, SCTLA emphasizes the identity of those who have disagreed with some aspect of the Commission's position (Opp. 1-2). But the administrative law judge (who dismissed the complaint) and the court of appeals (which remanded it) did so for mutually exclusive reasons. The ALJ found SCTLA had market power (*i.e.*, the "power to create a court emergency" (App. 205a)) but denied liability in the belief there was "no harm done" (*id.* at 227a). The court of appeals, by contrast, recognized that the boycott caused harm (*id.* at 53a), but held that Commission should be required to prove market power nevertheless (*id.* at 49a-51a). That the

1. The only conduct the Commission has challenged in this case was a concerted refusal by competing private practice attorneys to provide their services to the District of Columbia "unless we are granted a substantial increase in our hourly rate" (App. 78a). This is "the essence of 'price-fixing' " (App. 16a), and an "unlawful" and "classic restraint of trade within the meaning of Section 1 of the Sherman Act" (*id.* at 32a, 16a). The quoted descriptions are not "labels" invented by the Commission to avoid "analysis" (Opp. 12); they are the conclusions of the court of appeals after fully analyzing and rejecting the same spurious arguments that SCTLA repeats throughout its Opposition in an effort to differentiate its boycott from price-fixing (App. 16a-32a).

As the court recognized, SCTLA's conduct "could properly be condemned as a *per se* violation of Section 1 of the Sherman Act, unless it also comes within the protection of the First Amendment" (App. 32a). On that issue, this Court's holdings in *United States* v. *Albertini*, 472 U.S. 675 (1985), and *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) ("*CCNV*"), which the court of appeals unfortunately failed to consider, are dispositive, and SCTLA's efforts to distinguish them are understandably lame.

ALJ and the court both "disagreed" with the Commission is, under these circumstances, of no significance.

Likewise, the Solicitor General's declination to represent the Commission should not bear on consideration of its petition, as SCTLA suggests (Opp. 1). Fifteen years ago Congress expressly authorized the Commission to petition for certiorari by its own attorneys (15 U.S.C. 56(a)(3)); the Commission has exercised this authority on only one prior occasion (Pet. 1 n.1); and exercise of such authority is particularly appropriate in this case, where a court has created a new rule of law that will harm the Commission's antitrust mission far more seriously than it affects the Department of Justice's work (see *id.* at 18).

Albertini expressly held that "an incidental burden on speech is * * * permissible under [*United States* v.] *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" (472 U.S. at 689). SCTLA does not dispute the important role in efficacious law enforcement played by the Sherman Act's prohibition of price-fixing without regard to proof of market power. Nor does SCTLA attempt to minimize the major difficulties noted in our Petition (at 17-20) that antitrust plaintiffs would face in trying to meet the court's newly-minted market power requirements. SCTLA maintains only that *Albertini* is inapposite because the Sherman Act "is potentially very broad" and "not clearly intended to apply to these factual circumstances" (Opp. 9).

Although potentially broad, the Sherman Act as construed for nearly a century by this Court applies unmistakably to the "classic restraint of trade" involved here.[2] "Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1938).

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[2] Indeed, the applicability of the Sherman Act here is every bit as clear as was applicability of the statute in *Albertini*. The majority there devoted several pages to the issue of statutory applicability before resolving it in favor of coverage (472 U.S. at 680-684), while the dissenters, taking no issue with the majority's holding on the scope of the First Amendment (the holding overlooked and contravened by the court of appeals in this case), argued vigorously against statutory coverage (*id.* at 691-702). See also *Longshoremen* v. *Allied Internat'l, Inc.*, 456 U.S. 212, 225 (1982) (rejecting First Amendment challenge to statute prohibiting secondary boycotts that Congress had "purposefully drafted in broadest terms").

SCTLA would also distinguish *Albertini* on grounds that the courts have traditionally played a large role in interpreting the Sherman Act (Opp. 9). However, in so doing, courts may take cognizance only of Congress' purpose in passing the Act—to preserve competition. SCTLA deems this an "odd proposition" (Opp. 11), but its quarrel is with Congress. This Court made the same obvious point in *National Soc'y of Prof. Engin'rs* v. *United States*, 435 U.S. 679, 694-696 (1978).[3]

The Sherman Act is " 'as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms' " (*California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110-111 (1980)). Society's interest in efficacious enforcement of the "Magna Carta of Free Enterprise" (*ibid*) is as important as the societal interests in efficacious national park and peacetime military base administration that were sustained against identical First Amendment challenges in *CCNV* and *Albertini*.

2. SCTLA also accuses the Commission of launching an "oblique attack" on the Court's *Noerr-Pennington* doctrine (Opp. 11), but it is SCTLA and the court of appeals

[3] Of course, the statutory prohibition on naked horizontal price-fixing irrespective of market power (like any statutory provision) cannot be enforced if it contravenes the First Amendment. But it is circular to argue, as does SCTLA, that the First Amendment invalidates the Sherman Act's *per se* rule because courts in other cases have reinterpreted the Sherman Act for reasons related only to the underlying purpose of the Act itself. Unless compelled by constitutional mandate, a court may not decline to enforce the Sherman Act against conduct to which it plainly applies merely because a court feels that in a particular case the goal of promoting "expressive" price-fixing, or promoting health or safety, or promoting any other value, is more important than the statutory goal of preserving competition.

that would end-run that doctrine in this case. The court recognized that *Noerr-Pennington* did not protect SCTLA's "unlawful restraint of trade." It could not have held otherwise given this Court's recent statement in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, No. 87-157, slip op. at 9-10 (June 13, 1988) (citations omitted):

> We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for government ratemaking * * *. Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. * * * Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

Allied reiterates an understanding of *Noerr* that most businessmen have long respected: *Noerr* allows competitors to lobby jointly to induce the government to fix prices, restrict output, or otherwise restrain trade, but *Noerr* does not permit competitors collectively to fix prices or restrict output themselves in order to induce legislative or other governmental action. Under the court of appeals' decision, however, competitors henceforth need only cite *O'Brien* instead of *Noerr*, and style their conduct an "expressive boycott" (App. 56a) or "symbolic supply-disruption" (Opp. 13) instead of "lobbying," in order to

avail themselves of a special treatment under the antitrust laws that in practical effect may prove nearly as valuable as the absolute immunity so clearly unavailable under *Noerr* itself. The Commission is not insensitive to the role of politics, as SCTLA repeatedly charges (Opp. 2, 12-15); it simply believes the clear line that *Noerr* and *Allied* draw between the political rights of competitors and their antitrust responsibilities to the public should not be eroded as the court of appeals and SCTLA would do here.

3. SCTLA also dismisses as groundless the Commission's fear that the court's decision will encourage others to engage in "expressive" price-fixing, because the panel purported to limit its holding to the " 'factual context and environment' " of this case (Opp. 14). But those words mean little unless one can identify some legally significant fact(s) to distinguish this case from others. There cannot be one rule for lawyers and another rule for everyone else. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). Other businessmen will assume that the special treatment given the SCTLA lawyers is available to them if they can present a legally indistinguishable "context and environment" for the price-fixing boycotts they would like to conduct.

Although SCTLA describes the stalled lobbying campaign that preceded its boycott in great detail (Opp. 2-8), it nowhere specifies what features of that campaign or the boycott that followed distinguish it as a matter of law from many others.[4] Innumerable trade associations of

[4] In its Cross-Petition for Certiorari (No. 88-1393), SCTLA suggests its case is distinguishable from garden-variety Medicaid boycotts and others because SCTLA's members sought to vindicate the Sixth Amendment rights of the poor, for whom they merely acted as surrogates. But the court found SCTLA "ha[d] not argued th[is] point" and had even "acknowledged at oral argument before the Commission that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of their clients" (App. 30a).

competitors, like SCTLA, lobby for legislative favors every day and frequently make "active efforts to appeal to the public for support of their demand[s]" (App. 50a). Many of these campaigns, like SCTLA's, fail or stall despite support from members of the public and elements of the government.[5] Many of these campaigns also involve vital matters of public policy, such as the proper level of indigent medical care, or the proper level of spending on prisons, or defense, or roads and bridges, or the extent to which government should support or subsidize domestic industries. Surely these facts do not entitle those lobbyists who fail or grow impatient with their progress to conduct "horizontal output restrictions * * * to dramatize the plight of their industry and spur legislative action" (*Allied*, slip op. at 10).[6]

[5] That some in the District government supported the "goals" of the boycott as SCTLA claims (Opp. 15) is not to say they approved the means by which SCTLA pursued its goals, and SCTLA's suggestion that concerted price-related refusals to deal by competitors are a "well-understood lobbying tactic used by many groups in the District of Columbia" (*id.* at 8 n.10) is an affront to District governance not supported by anything SCTLA cites. The District did capitulate to the boycott, but targets do so for many reasons unrelated to a boycott's legality, and this Court has long held that neither acquiescence nor the knowing "wink" or "tacit[] approv[al]" of government employees bears on a boycott's legality. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 226-227.

[6] The court and SCTLA both find it significant that the lawyers' boycott resembled a "strike" (App. 50a, Opp. 14). But this analogy hardly argues for special antitrust treatment, given that true "strikes" by *bona fide* government "employees" are generally criminal offenses, whether or not the strikers have market power or cause demonstrable harm. See *United Fed'n of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd mem.*, 404 U.S. 802 (1971); cf. *Longshoremen* v. *Allied Internat'l, Inc.*, 456 U.S. at 225-227 (rejecting First Amendment challenge to broad *per se* statutory prohibition against secondary boycotts). SCTLA has never claimed to be a "labor organization"

SCTLA also emphasizes (without suggesting it is legally relevant) the alleged reasonableness of the billing rate increase it sought (Opp. 2-3, 5). It may be that the court of appeals fell into error from sympathy for what many lawyers believed was the low CJA billing rate in 1983. But that neither justifies the decision in this case, nor distinguishes it in the eyes of Medicaid physicians or numerous other would-be boycotters and their supporters who believe their demands for increased reimbursement are no less sympathetic. Courts are unsuited to determine the "reasonableness of prices," which has long been rejected as a cognizable defense to price-fixing (*e.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 221; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927)).

Although it is thus not an antitrust plaintiff's burden to prove fixed prices unreasonable, it bears mention that no lawyer was forced to accept CJA cases at the rate offered by the D.C. Government before the boycott.[7] Nevertheless

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under the antitrust labor exemption (15 U.S.C. 17 and 29 U.S.C. 52); were its members District employees, a "strike" would subject them to criminal penalties (see 5 U.S.C. 7311; 18 U.S.C. 1918) rather than to the civil order to cease and desist they face here.

[7] In this regard, SCTLA's claim that its case is unique because it involves a "legislatively-set" price rather than "competitors setting their own prices" (Opp. 15) was properly rejected by the court, which recognized that "[t]he antitrust laws do not protect only purchasers who negotiate each transaction individually, instead of posting a price at which they will trade with all who come forward" (App. 18a-19a). In markets in which buyers post a price, price-fixing takes exactly the form it took here—a concerted refusal by sellers to sell at the offered price. That such agreements "do[] not involve secrecy" (Opp. 15) also neither distinguishes them nor warrants special treatment, for "openness does not immunize agreement" (*San Juan Racing Ass'n* v. *Associacion de Jinetes*, 590 F.2d 31, 32 (1st Cir. 1979) (enjoining, as unlawful price-fixing, concerted refusal to deal by race track jockeys at rate offered by state-owned track)).

(perhaps because new law graduates exceeded new law jobs during the period in question (App. 165a-166a & n.89)), enough lawyers freely accepted CJA cases to allow the District of Columbia to provide (until the boycott) legal care that SCTLA recognized was on the whole "adequate to secure the Sixth Amendment rights of [its] clients" (*id.* at 30a).

In a world of unlimited resources, the D.C. government would spend even more on indigent legal care than SCTLA demanded. But in a world of finite means, the need to pay lawyers $4-5 million per year more to end a boycott left the District that much less money to spend to feed the hungry, shelter the homeless, fight drugs and disease, or accomplish any number of other perennially underfunded public missions that compete with indigent legal care for scarce public funds.[8] SCTLA's conviction that its circumstances are unique and its demands on the public purse uniquely compelling neither justifies the unprecedented antitrust treatment the court would give it nor

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[8] SCTLA's suggestion that the District was not coerced into spending the extra money because it could "draft" members of the D.C. Bar to handle CJA cases (Opp. 7, 15) ignores the substantial, if unquantifiable, costs this alternative also imposes on society. Precisely because an earlier draft (during a boycott unrelated to price) had engendered such costs (*e.g.*, "strenuous" resistance by lawyers and commencement of a legal challenge to the draft), Chief Judge Moultrie, long before the 1983 boycott, had "indicated an unwillingness to impose similar drafts" (App. 159a-160a). Although SCTLA's "draft" theory makes little more sense than a claim that collective refusal to produce by the nation's steel mills could not be coercive because the National Guard could always be recruited to run them, it illustrates (as does the discussion at Opp. 13-14 & n.16) the type of argument that will complicate, protract, and frustrate resolution of future "expressive" price-fixing cases, as antitrust enforcers and defendants struggle to fathom the meaning of the new "market power" test announced by the court below.

instills confidence that many others will not use the decision below to claim the same treatment for themselves.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the writ of certiorari should be granted.

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PETITIONER'S

BRIEF

Nos. 88-1198 and 88-1393

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,
CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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QUESTIONS PRESENTED

1. Whether a naked price-fixing boycott undertaken by economic competitors as part of a larger public campaign to obtain an increase in fees paid to them by the government is immunized from all antitrust scrutiny by the First Amendment.

2. Whether a naked price-fixing boycott undertaken by economic competitors as part of a larger public campaign to obtain an increase in fees paid to them by the government is shielded from *per se* prohibition under the Sherman Act (15 U.S.C. 1), on the ground that the boycott constitutes expressive conduct protected by the First Amendment.

3. Whether, assuming that the *per se* rule of illegality does not apply, an antitrust plaintiff must satisfy any required showing of market power by offering proof apart from the boycotters' successful effort to restrict the output of, and increase the price for, the service they offer.

PARTIES TO THE PROCEEDINGS

Respondents and cross-petitioners, all of whom were respondents in the proceedings before the Federal Trade Commission, include the Superior Court Trial Lawyers Association, Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison, and Joanne D. Slaight.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a)[1] is reported at 856 F. 2d 226. The opinion and final order of the Federal Trade Commission (Pet. App. 64a-138a) and the initial decision of the administrative law judge (Pet. App. 139a-229a) are reported at 107 F.T.C. 510.

JURISDICTION

The judgment of the court of appeals (Pet. App. 62a) was entered on August 26, 1988. A petition for rehearing

[1] All references to "Pet. App." are to the Appendix to the petition filed in No. 88-1198.

was denied on October 25, 1988 (Pet. App. 63a). The petitions for certiorari were filed respectively on January 23, 1989 (No. 88-1198) and February 22, 1989 (No. 88-1393), and granted on April 17, 1989. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution, Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), are set forth at Pet. App. 230a.

STATEMENT

1. This case involves a successful boycott by competing private-practice attorneys, who refused to provide their services to the District of Columbia unless they were paid a higher price. The attorneys were members of respondent Superior Court Trial Lawyers Association (SCTLA), an organization of attorneys registered to accept case assignments under the Criminal Justice Act, D.C. Code Ann. §§ 11-2601 *et seq.* (1981 & Supp. 1988) (the CJA).[2] The CJA provides for appointment of private counsel to represent indigent persons charged with crimes in the District of Columbia Superior Court.

CJA attorneys represent approximately 85% of all Superior Court defendants who are unable to afford counsel.[3] Any member in good standing of the D.C. Bar

[2] Respondents Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison, and Joanne D. Slaight are or were District of Columbia attorneys with practices consisting primarily of CJA assignments. All were leaders of the challenged SCTLA boycott. (Pet. App. 77a-82a, 148a-151a.)

[3] Another 8-10% (generally in more serious cases) are represented by the Public Defender Service, and the rest by third-year law students (3-5%) and *pro bono* private attorneys (under .5%) (Pet. App. 3a).

with a local address and phone number may register with the CJA office of the Public Defender Service (PDS) to receive appointments, and some 1200 attorneys have so registered. In practice, however, most appointments go to a much smaller group of about 100 CJA "regulars." These attorneys frequently seek appointment to handle CJA cases and earn most or all of their income from them. (Pet. App. 3a-4a.)

From 1970 until 1983, CJA case fees were $30 per hour for court time and $20 per hour for other time, subject to a per-case maximum of $1000 for felonies, $400 for misdemeanors, and $1000 for appeals (Pet. App. 4a). These fees were equal to the maximum rate then being paid by the federal government for representation of indigent defendants in federal court.[4] Although CJA fees had remained constant for thirteen years and participation in the CJA program was strictly voluntary, the overall quality of representation "improved markedly" during this period (*id.* at 166a, 112a n.117). Indeed, "[c]ounsel for [the SCTLA lawyers] acknowledged * * * that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of their clients" (*id.* at 30a). Nevertheless, as early as 1975, the level of CJA fees had become a matter of concern among some members of the bar (*id.* at 5a).

Beginning in 1982, various CJA attorneys acting through the SCTLA mounted a collective lobbying effort to increase CJA compensation levels. In seeking to justify a rate increase for themselves, the lawyers argued, *inter alia*, that the public, including indigent defendants, would benefit from such an increase. In March 1983, D.C. City

[4] The CJA (D.C. Code Ann. § 11-2604(a) (1981 & Supp. 1988)) provided for compensation of attorneys "at a rate fixed by the Joint Committee on Judicial Administration, not to exceed the hourly scale established by [the federal statute for appointed counsel, 18 U.S.C. 3006(d)(1)]." (See Pet. App. 73a n.13.)

Council Chairman David Clarke introduced a bill to increase CJA rates to $35 per hour. Although several witnesses testified in favor of the bill, the Executive Branch of the D.C. Government raised financial concerns, and as of August 1983 no legislation had been enacted. (Pet. App. 6a-7a.)

Dissatisfied with their lobbying efforts, CJA lawyers formed the "SCTLA Strike Committee," chaired by respondent Slaight, to consider other means of obtaining a fee increase (Pet. App. 7a-8a).[5] On August 11, 1983, a group of about 100 CJA lawyers met and agreed to refuse new CJA case assignments unless the D.C. Government increased CJA rates by September 6, 1983. The lawyers memorialized their agreement by posting a petition in the lawyers' lounge of the D.C. Superior Court. The petition, signed by numerous CJA attorneys, stated (*id.* at 8a):

> We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.

Respondent Perrotta also sent a letter to 40 D.C. law firms that had previously indicated a willingness to do pro bono work, urging them not to accept CJA cases if a boycott ensued (*id.* at 9a).

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[5] SCTLA has often referred to the collective refusal of its members to accept new case assignments as a "strike." However, the CJA lawyers – independent entrepreneurs engaged in the private practice of law – were not D.C. government employees, nor has SCTLA ever suggested that it is a "labor organization" for purposes of the so-called "labor exemption" to the antitrust laws (Pet. App. 7a n.6). Had the CJA attorneys been D.C. government employees "on strike," they would have been subject to criminal fines and imprisonment for their conduct. See 5 U.S.C. 7311; 18 U.S.C. 1918.

When the District of Columbia government did not increase CJA reimbursement rates as the lawyers had demanded, the CJA attorneys implemented the boycott as planned. The boycott, which began on September 6, 1983, and included among its adherents nearly all CJA "regulars," had a "severe impact on the criminal justice system" (Pet. App. 9a). PDS attorneys and the few other bar members who volunteered to accept new case assignments could not keep pace with the flow of new cases. On September 15, "convinced that the system was on the brink of collapse" (*id.* at 197a), the PDS leadership wrote to Mayor Barry urging him to support legislation increasing CJA rates.[6]

The Mayor met that evening with respondents Koskoff, Perrotta, and Addison, and agreed to support Councilman Clarke's bill. On September 20, 1983, the D.C. City Council passed the bill unanimously, and on September 21, 1983, the CJA attorneys began accepting new assignments. (Pet. App. 10a-11a.) The cost of funding the CJA rate increase was estimated to be $4-5 million per year at the time of the boycott (*id.* at 206a).

2. On December 16, 1983, the Federal Trade Commission (Commission) issued a complaint alleging that the CJA lawyers' concerted refusal to accept new case assignments unless the District increased its price constituted "a conspiracy to fix prices and to conduct a boycott" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (Pet. App. 11a, 141a).[7]

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[6] Chief Judge Moultrie also advised the mayor that the criminal justice system was approaching a crisis point. Separately, in a letter to the president of the D.C. Bar, Judge Moultrie noted that he was "unalterably opposed to a strike or an organized boycott as a method to bring about the needed changes." (Pet. App. 81a & n.47.)

[7] The "[u]nfair methods of competition" proscribed by Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), in-

The administrative law judge (ALJ) to whom the case was assigned held hearings and entered an initial decision dismissing the complaint (*id.* at 139a-229a).

The ALJ recognized that respondents expected their boycott to "have a severe impact on the District's criminal justice system," and he noted that "[t]his expectation was fully realized," in part because "there was no one to replace the CJA regulars, and makeshift measures were totally inadequate" (Pet. App. 195a-196a). The ALJ rejected respondents' claim that they lacked market power, finding that contention "contradicted by the entire record" (*id.* at 205a). The ALJ also rejected the SCTLA lawyers' claim that their conduct was a form of "political action" protected by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), or "political petitioning" immune from antitrust scrutiny under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (Pet. App. 11a, 209a-216a, 228a).

The ALJ nevertheless dismissed the complaint because, in his view, "there was no harm done" (Pet. App. 227a). The ALJ surmised that "city officials" favored a fee increase for the CJA lawyers. Because a boycott was the only means to induce the City Council to effect what these "city officials" and others deemed proper public policy, the ALJ concluded that "it cannot be presumed that the higher costs attributable to the 1983 boycott are adverse effects" (*id.* at 227-228a.)

The Commission unanimously reversed (Pet. App. 69a-138a). The Commission explained that "[t]he purpose of the boycott was to increase fees" and that the boycott had "succeeded in forcing the city to increase CJA fees"

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clude restraints of trade that violate Section 1 of the Sherman Act, 15 U.S.C. 1. See *FTC* v. *Cement Institute*, 333 U.S. 683, 693 (1948). The Commission applied Sherman Act precedents in reaching its decision.

(*id.* at 87a-88a). "Such concerted action to raise prices," the Commission added, "has consistently been held unlawful by the courts" (*id.* at 88a). The Commission found respondents' boycott unlawful, both under a *per se* rule (*id.* at 87a-92a), and under the rule of reason (*id.* at 92a-98a).[8] Finally, the Commission held that respondents' conduct was not immunized by the First Amendment—either by the *Noerr* doctrine or by *Claiborne Hardware* (*id.* at 103a-132a). The Commission therefore entered a cease and desist order designed to prohibit SCTLA and the named individual respondents "from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process" (*id.* at 136a).

3. The court of appeals reversed the Commission's decision and remanded the case for determination whether the boycotting CJA attorneys possessed market power (Pet. App. 1a-61a). The court recognized that the SCTLA boycott was "the essence of 'price-fixing' " and a "classic restraint of trade" (*id.* at 16a) that, if "viewed through the ordinary lens of antitrust law" (*id.* at 15a), would "properly be condemned as a *per se* violation of Section 1 of the Sherman Act" (*id.* at 32a).[9] The court also rejected the

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[8] In so holding, the Commission rejected the " 'knowing wink' defense" that had appealed to the ALJ (Pet. App. 98a; see n. 40, *infra*). It stated that "[t]he record shows that the District government increased the fees for lawyers under its CJA program only when it was coerced by the respondents to do so" (*id.* at 96a). In any event, the Commission continued, "the acquiescence or support of some members of the city government would not immunize the [SCTLA] boycott to increase prices from the antitrust laws" (*id.* at 97a).

[9] The court noted that the lawyers' price-fixing boycott was a "naked" restraint of trade, *i.e.*, it was not ancillary to any efficiency-producing integration of functions by competitors. Although judicial treatment of so-called "ancillary" restraints has varied, the court recognized that there has never been a change in the rule that such

SCTLA lawyers' reliance on the *Noerr* doctrine. The court explained that, unlike in *Noerr*, the market restraint here "resulted from private, rather than governmental, action" (*id.* at 37a) and that the lawyers "did not 'confine [themselves] to efforts to persuade,' " but rather " 'organized and orchestrated' a concerted effort to restrict the supply of services in the market place" (*id.* at 38a). The court dismissed as well the contention that SCTLA's conduct was a "political boycott" under *NAACP* v. *Claiborne Hardware Co.*, *supra*, affirming "the FTC's finding that the boycott was motivated primarily by economic self-interest" (Pet. App. 43a).

Although it rejected the claims of absolute First Amendment immunity for the lawyers' boycott, the court then concluded that "the SCTLA boycott did contain an element of expression warranting First Amendment protection" (Pet. App. 46a). It therefore applied the four-part test for evaluating restraints on "expressive conduct" in *United States* v. *O'Brien*, 391 U.S. 367 (1968), to determine whether application of the Sherman Act's *per se* prohibition of naked price-fixing agreements could be sustained in this case.

The court concluded that the Commission's action met the first three parts of the *O'Brien* test. Thus, the court acknowledged that the antitrust laws "lie within the constitutional power of Congress to regulate commerce"; that "the government's interest in prohibiting restraints on competition is 'important or substantial' "; and that enforcement of the antitrust laws is in no way " 'related to'

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naked horizontal restraints are illegal *per se* (Pet. App. 16a, 21a-22a). This Brief refers to "*per se*" illegality, "summary condemnation" and "condemnation without regard to market power" interchangeably to denote the circumstances in which the Sherman Act prohibits naked horizontal restraints of trade irrespective of whether market power (or actual detrimental competitive effects) can be proven.

the suppression of free expression" (Pet. App. 47a). The court held, however, that application of the *per se* rule failed the fourth *O'Brien* criterion, *i.e.*, that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of [the governmental] interest [served by the statute]" (*ibid.*). The court recognized that *per se* rules are a "legitimate and substantial aid in the administration of the antitrust laws" (*id.* at 50a), but held that this "evidentiary shortcut to antitrust condemnation without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate" (*ibid.*).

Finally, the court of appeals held that the present record does not establish that respondents enjoyed market power, even though the boycotters comprised nearly all the attorneys who made a practice of handling CJA cases and the boycott had "dramatically reduced the supply of lawyers to the city's CJA program' " and " 'adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants' " (Pet. App. 53a-55a). The court observed that the Commission would most likely be required on remand to "examine structural evidence to determine the degree of market power, if any, that [respondents] wielded" (*id.* at 55a). The court further directed that the Commission must determine "how much market power is sufficient to justify the condemnation of an expressive boycott"—an inquiry that the court termed "a matter of first impression" (*id.* at 56a).[10]

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[10] Judge Silberman concurred in a separate opinion (Pet. App. 58a-61a). In his view, the lawfulness of respondents' boycott turned not on whether it was driven by commercial or political motives, but on whether, in light of the techniques used by the participants, the boycott succeeded through political pressure, rather than through economic coercion. He concluded that if, on remand, it is established that respondents enjoyed no market power, then "the boycott must

INTRODUCTION AND SUMMARY OF ARGUMENT

In their own words, the SCTLA lawyers "agree[d] that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act" (Pet. App. 8a). When the City did not increase the hourly rate, the lawyers implemented their agreement and collectively withheld their services until offered a higher price for them. As the court of appeals' opinion demonstrates (*id.* at 14a-22a), the lawyers' conduct was "the essence of 'price-fixing'," and "a classic restraint of trade within the meaning of Section 1 of the Sherman Act" (*id.* at 16a).[11]

Naked horizontal price-fixing agreements are unlawful *per se*, without regard to whether the conspirators can be proven to have market power (Pet. App. 20a). This Court "ha[s] not wavered in [its] enforcement of the *per se* rule against price-fixing" (*Arizona* v. *Maricopa County Med-*

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have succeeded out of persuasion and been a political activity" (*id.* at 60a).

[11] SCTLA has at various times sought to distinguish its conduct from price-fixing by contending that the City Council, rather than the CJA lawyers, set the price for CJA services. In fact, the City Council, like any buyer, merely established the price it would *offer* for CJA services. Lawyers were not obligated to work at that price and many lawyers declined to do so (though, except when they boycotted, never in such numbers that the City was left unable to supply counsel to the indigent accused). The law prohibits agreement by sellers on the price at which they will offer to sell. Where, as in the market for indigent legal services (and as in many other markets), the buyer posts a price and invites sellers to supply it at that price, price-fixing takes precisely the form it took here: the collective refusal by sellers to offer their services unless and until the buyer increases its posted price. See *e.g.*, Pet. App. 18a-19a; *San Juan Racing Ass'n* v. *Asociacion de Jinetes*, 590 F.2d 31 (1st Cir. 1979) (enjoining, as unlawful price-fixing, concerted refusal to deal by race track jockeys at rate offered by state-owned track).

ical Society, 457 U.S. 332, 347 (1982)). It has "consistently and without deviation" held naked horizontal price-fixing agreements to be unlawful "contract[s] * * * in restraint of trade" (15 U.S.C. 1), whether or not the conspirators can be proven to have market power and no matter how reasonable one may consider the prices they fix to be (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 221 (1940)).

"As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output" (*FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986), citing *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 (1984)). This "oldest and clearest of antitrust doctrines" (R. Bork, *The Antitrust Paradox* 67 (1978)) provides valuable certainty to those who must obey the law and makes possible effective law enforcement (*Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 344). And while "[*p*]*er se* rules always contain a degree of arbitrariness," the *per se* rule against naked horizontal price-fixing has uniformly been found "justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result." *United States* v. *Container Corp.*, 393 U.S. 333, 341 (1969) (Marshall, J. dissenting); see also, *e.g.*, 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 836, at 351 (1978); 7 P. Areeda, *Antitrust Law* ¶ 1509, at 408-413 (1986).

The court of appeals recognized these principles, but devised a novel and untenable exception to them. Its holding that there is no absolute immunity for price-fixing is correct, but its conclusion that special new antitrust rules should govern analysis of the price-fixing in this case should be reversed.

1. The court of appeals held correctly that nothing in the First Amendment, as construed by this Court, im-

munized SCTLA's price-fixing boycott entirely from antitrust scrutiny. The *Noerr* doctrine, by which this Court has balanced the speech and lobbying rights of competitors against the antitrust rights of the public, very clearly does not protect the conduct here. Under *Noerr*, competitors may lobby collectively to persuade the legislature to fix prices and restrict output, but may not collectively fix prices or restrict output themselves (as the SCTLA lawyers did) in order to induce the legislature to take action. Likewise inapplicable is *NAACP* v. *Claiborne Hardware Co., supra*, which conferred First Amendment protection against a state tort law challenge on a "political boycott" by consumers seeking to vindicate basic rights of freedom and equality. *Claiborne Hardware* does not afford antitrust immunity to price-fixing boycotts by competitors who seek to promote their parochial economic interests by arguing that those interests coincide with the public good.

2. Although the court of appeals correctly recognized that the First Amendment does not entirely immunize the conduct here from antitrust scrutiny, it erred in holding that an otherwise *per se* unlawful price-fixing boycott that is used to further a public lobbying campaign could—under the *O'Brien* test—be condemned only upon a showing that the participants had market power. As a threshold matter, there is serious doubt whether *O'Brien* applies at all. The *per se* rule prohibited respondents' boycott—their concerted refusal to deal—and not their speech, their lobbying, or their press relations. This Court's *Noerr* and *Claiborne Hardware* decisions make ample accommodation for First Amendment expression, and there is no warrant for superimposing the *O'Brien* test on those carefully confined doctrines.

But even assuming that *O'Brien* applies, the traditional *per se* rule easily meets its standards: the rule is within the constitutional power of the Government; it furthers an

important or substantial governmental interest unrelated to the suppression of free expression; and it incidentally restricts alleged First Amendment freedoms no more than is essential to further that underlying interest. In concluding that the Sherman Act failed the latter requirement, the court of appeals failed to accord the governmental interest in *efficacious* law enforcement the weight required by *O'Brien* itself and by this Court's decisions construing *O'Brien*. The court likewise failed to consider the implications of its holding for the ability of government and other antitrust plaintiffs to enforce the antitrust laws against all those who might seek the same special treatment accorded the lawyers here.

3. The court of appeals compounded its error by imposing upon those seeking to challenge "expressive price-fixing" a new and inordinately complex standard of market power proof. Even in evaluating alleged antitrust law violations to which *per se* treatment is not applicable, proof of market power is required only where proof is lacking that a restraint has caused actual detrimental effects. The purpose of proving market power is to help the court predict whether challenged conduct (such as a corporate acquisition) has the capacity, and is likely, to cause adverse competitive effects. In this case, however, the factfinder concluded, and the court of appeals did not dispute, that the boycotting lawyers fully realized their expectation that refusing to accept new cases would severely impede the District's capacity to provide indigent counsel. The court of appeals has offered no persuasive explanation why this evidence, as in all other cases, should not satisfy any showing of market power that might be required.

ARGUMENT

I. THE USE OF PRICE-FIXING TO LOBBY IS NOT IMMUNE FROM ANTITRUST LIABILITY UNDER THE FIRST AMENDMENT

The court of appeals unanimously agreed, as had the ALJ and the unanimous Commission before it, that nothing in the First Amendment entirely immunized the SCTLA lawyers' boycott from antitrust scrutiny. The court's holding on this point (Pet. App. 32a-45a) was correct and should be affirmed.

A. The *Noerr* Doctrine Does Not Shield the SCTLA Boycott from Scrutiny Under the Antitrust Laws.

Over the past three decades this Court has developed a body of case law—the *Noerr* doctrine[12]—to assure that the broad prohibitions of the Sherman Act do not infringe the First Amendment rights of competitors to petition their government. Application of that doctrine to the facts of this case is clear: competitors may jointly lobby the legislature to fix prices or restrict output (as the SCTLA lawyers did in early 1983), but competitors may not themselves fix prices or restrict output in an effort to induce the legislature to take favorable action (as the SCTLA lawyers did when they collectively refused to accept new cases "unless we are granted a substantial increase in our hourly rate").

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court held that a concerted effort by railroads to persuade the Pennsylvania legislature to enact legislation detrimental to the trucking industry could not be a Sherman Act violation even though (1) the purpose of the railroads in seeking the

[12] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). See also *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

legislation was to injure competition; (2) the effect of the legislation would be to injure competition; and (3) some direct injury to competition might occur as an incidental result of the publicity campaign used by the railroads to communicate their views. Noting that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint" (365 U.S. at 136), the Court observed that (*id.* at 136-137):

> [a]lthough such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination[s] • • • in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint.

This Court in *Noerr* thus viewed the issue before it to be whether, in light of the First Amendment right to petition, "an expansive construction" (365 U.S. at 136) or an "extension of the Sherman Act" (*id.* at 141) should be allowed that would condemn anticompetitively motivated "agreement[s] jointly to seek legislation or law enforcement"

(*id.* at 136). The defendants in *Noerr* made no attempt to suggest that "combinations normally held violative of the Sherman Act," such as price-fixing or joint restrictions of output, could be made legal merely because they were used as a means of garnering publicity for a cause or otherwise pressuring the legislature. And this Court clearly assumed that, by its disposition of the case, it was not suddenly making such combinations legal after more than 60 years of *per se* condemnation under the Sherman Act.

The *Noerr* doctrine simply does not shield unreasonable restraints of trade that are wholly independent of any restraint *resulting from* the governmental activity sought by the defendant. In this respect it follows the common sense proposition that there is no "constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society" (*Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 501 (1949)). Just as no one would suggest that the SCTLA lawyers might lawfully have obstructed access to various councilmembers' offices unless those legislators agreed to speak to them or vote for their demands, so too, *Noerr* does not authorize the lawyers to engage in conduct that otherwise violates the Sherman Act to achieve the same result.

That *Noerr* does not immunize private price-fixing was reiterated by this Court only last year in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, No. 87-157 (June 13, 1988). In that case the respondent, a manufacturer of plastic conduit, brought an action under the Sherman Act, alleging that petitioner, a leading producer of steel conduit, had unreasonably restrained trade in the electrical conduit market. Respondent contended that petitioners had conspired with others to exclude respondent's product from a code of industry standards, thereby causing respondent considerable commercial damage. Petitioner

defended its conduct under *Noerr*, claiming that its efforts to exclude plastic conduit from the code were intended to affect governmental legislation. This Court rejected that defense, holding that the *Noerr* doctrine does not "immunize[] every concerted effort that is genuinely intended to influence governmental action" (slip op. 9). In language strikingly appropriate to the present case, the Court explained (*id.* at 9-10):

> If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price-agreements as long as they wished to propose that price as an appropriate level for government ratemaking • • •. Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. • • • Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

The SCTLA lawyers here took the very action that this Court cautioned against in *Allied Tube*: they declared a "boycott[] or horizontal output restriction[] • • • intended to dramatize the plight of their industry and spur legislative action" (slip op. 10). The court of appeals correctly held that *Noerr* offers no immunity for such activity.

B. The *Claiborne Hardware* Decision Does Not Shield the SCTLA Boycott From Scrutiny Under the Antitrust Laws

Noerr's clear dividing line between competitors who lobby the legislature to fix prices, and competitors who fix prices themselves in order to induce the legislature to take

action, has not been altered by *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In that case black consumers refused to deal with white merchants in order to induce government and business leaders to comply with a list of demands for equality and racial justice. The Court held that such a boycott was entitled to First Amendment protection against a state tort law challenge. The Court explained that while the government has "broad power to regulate economic activity," it does not have the right to "prohibit peaceful political activity such as that found in the boycott in this case" (*id.* at 913). The Court emphasized that the purpose of the boycott was not to destroy legitimate competition" but rather "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself" (*id.* at 914).

This Court has consistently rejected efforts, such as that made by SCTLA here, to extrapolate *Claiborne Hardware*'s "political boycott" doctrine to boycotts by economic competitors seeking an economic benefit for themselves.[13] In *Claiborne Hardware* itself, the Court cited, by way of defining the limitations on its holding, the Fifth Circuit's characterization of the same boycott rendered in a related case (458 U.S. at 915, citing *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)):

> There is no suggestion that * * * defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the

[13] Indeed, the Court has even declined to extend First Amendment protection to a secondary boycott by labor union members whose *only* purpose in conducting the boycott was political—to protest Soviet foreign and military policies. See *International Longshoremen's Assoc.* v. *Allied International, Inc.*, 456 U.S. 212 (1982).

> contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment.

In *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, *supra,* the Court reiterated that *Claiborne Hardware* is limited to cases that do not involve economic competitors seeking self-serving economic benefits. As the Court observed in *Allied Tube*, the boycott in *Claiborne Hardware* "was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution" and "the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market" (slip op. 14-15). The Court contrasted those facts with the situation in *Allied Tube* itself, in which "petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete" (*ibid.*).[14]

[14] The cited language disposes of the suggestion made by SCTLA in proceedings below that there is significance to the fact that the *Claiborne Hardware* boycotters, by eliminating racial discrimination against themselves, sought personal economic benefits through increased employment opportunities. Obviously, the elimination of discrimination can be of ultimate economic advantage in many ways to the former victims of that discrimination. *Allied Tube* makes clear, however, that boycotts potentially yielding such a benefit are not analogous to agreements by which economic competitors merely seek

It is apparent, moreover, as the court of appeals observed, that expanding the limits of *Claiborne Hardware* in the manner urged by SCTLA would lead to "economic chaos" (Pet. App. 45a). Before the lower court, SCTLA maintained that immunity should be conferred upon all competitor boycotts " 'designed to dramatize public issues' " (*ibid.*) or "mobilize the political pressure necessary to enact * * * a statute" (86-1465 Pet. Br. at 32). This approach would legalize numerous price-fixing boycotts both against governments, (as the court of appeals recognized (Pet. App. 45a, 28a)), and against private parties as well.[15]

The SCTLA lawyers are hardly unique in believing that their work serves a purpose greater than providing them with a source of income. As the court of appeals recognized, "[n]o doubt most business people who sell to the government are of the opinion that they could better serve the public if only the price of their goods or services were increased" (Pet. App. 28a). And no doubt, too, the more than 20% of the gross national product that legislatures appropriate for various goods and services (*id.* at 45a & n.31) implicates innumerable "public issues" and matters of "public importance," as to which various interest groups might wish to communicate and publicize their views. Manifestly, however, vital antitrust protections would be intolerably eroded if concerted price-related refusals to deal by competitors are permitted in circumstances such as those in this case.[16]

"to profit financially from a lessening of competition in the boycotted market" (slip op. 15).

[15] *Claiborne Hardware* itself involved a boycott against private businesses. If its holding is extended to protect competitor boycotts, there is no logical reason why that extension should apply only to boycotts directed against governments.

[16] Both the court of appeals and the Commission found that the SCTLA boycott "was motivated primarily by economic self-interest"

In its cross-petition for certiorari, SCTLA has apparently sought to narrow the untenably broad positions it advanced before the Commission and the court of appeals, arguing now (88-1393 Pet. 7) that its boycott should receive First Amendment protection because the lawyers were acting as "surrogates" for persons "who could not or would not act for themselves." However, many businessmen can and do claim to be surrogates for persons who will benefit from, but are not well able to affect the quality of, the goods and services those businessmen purvey. Physicians who treat indigents under Medicaid programs are as much "surrogates" for their patients when they seek an increase in state Medicaid payments as the SCTLA lawyers were "surrogates" for their indigent clients. Engineers who collectively refuse to engage in competitive bidding on major public construction projects may claim that they are "surrogates" for the motoring public that uses bridges and roads but is in no position to decide

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(Pet. App. 43a). This finding is abundantly supported by a record showing that the dominant focus of the boycott was a rate increase for the lawyers, as opposed to numerous other measures arguably more relevant to the welfare of indigent clients (such as an increase in the number of compensable hours that a lawyer might spend on a single case) (*ibid.*). Although overwhelming evidence of the lawyers' parochial economic motivation makes this case a simple one, we agree with Judge Silberman's concurrence (id. at 58a-60a) insofar as it suggests that application of *Claiborne Hardware* should not turn on the subjective motivation of a particular group of price-fixing competitors. In practice, virtually *every* public price-fixing boycott directed against the government will involve mixed motives – competitors who want a price increase and also believe the public will benefit by spending more on their services. The dicta in *Claiborne Hardware* and *Allied Tube* cited above establish – and this Court should so hold – that price-fixing by competitors, whatever the precise (but unfathomable) ratio of avarice to idealism that motivates it, is simply not constitutionally protected conduct.

upon (or implement) the steps needed to maintain safe highways (see *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978)). Each of these groups, and many others as well, may make a "surrogacy" claim every bit as earnestly as respondents do. None, however, falls within *Claiborne Hardware*.

SCTLA's other proposed effort to distinguish its conduct—that by increasing the billing rates of lawyers, its boycott was designed to vindicate its clients' Sixth Amendment right to effective assistance of counsel (88-1393 Pet. 7)—is also insupportable. For one thing, as the court of appeals expressly noted, citing the Commission (Pet. App. 30a):

> Counsel for the petitioners [SCTLA] acknowledged at oral argument before the Commission that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of their clients.[17]

The court of appeals nevertheless allowed both SCTLA and its amici to make arguments regarding the adequacy of pre-boycott representation that SCTLA had expressly disavowed before the Commission (Pet. App. 29a-32a). And in reliance on these arguments, the court of appeals declined to accept the Commission's affirmative finding that the pre-boycott level of representation was adequate (*id.* at 30a n.21).[18] In the end, however, the court recog-

[17] Before the Commission, SCTLA characterized the debate as one over the level of subsidized representation appropriate for indigent defendants (Pet. App. 114a):

> There [was] a Chevrolet[] sort of quality * * * service being provided. There were some people who thought we really ought to have an Oldsmobile quality service.

[18] The Commission had based its finding in part upon the fact that reversals of criminal convictions for ineffective assistance of counsel were "exceedingly rare" and in part upon SCTLA's representation to it that pre-boycott assistance was generally adequate (Pet. App. 112a).

nized (as had the Commission and ALJ (*id.* at 165a)), that there was no record basis from which one might conclude that pre-boycott rates had resulted in significant Sixth Amendment violations, and it explained how such a showing might have been made had SCTLA intended to do so (*id.* at 31a). As the court then concluded (*id.* at 31a-32a), the SCLTA lawyers

> have simply not pursued the argument, and their occasional references to the constitutional underpinnings of their boycott are but so much parsley to garnish the arguments they have made. Thus, we decide this case as it comes to us, upon a record that does not support, and by petitioners who do not seek a finding that the preboycott rates resulted in systematic violations of the Sixth Amendment.

Even if vindication of Sixth Amendment rights were a defense to price-fixing, the "one seeking relief bears the burden of demonstrating that he is entitled to it" (*Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984)). Having represented to the Commission that the public issue in their boycott was the proper level of funding for indigent legal services, rather than the constitutional adequacy of those services, SCTLA (and its amici) should not be heard to argue the opposite before this Court (see *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)).

Finally, even if the record did show (which it does not) that the difference between the pre-boycott CJA rates and the post-boycott rates made the difference between receipt and denial of Sixth Amendment rights by indigents, and even if the record did show (which it does not) that the CJA lawyers' concern for the rights of their clients was the paramount motive for their price-fix, this still would not warrant constitutional protection for a price-fixing

boycott by competitors. "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it" (*FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. at 465; see also *Fashion Originators' Guild, Inc.* v. *FTC*, 312 U.S. 457, 467-468 (1941)).

There is no more reason to permit vigilante price-fixing than to permit any other form of unlawful action undertaken by those purporting to further some higher purpose. And there is no apparent reason why the antitrust obligations (or the First Amendment rights) of competitors should turn on whether they offer a service that the government is expressly required to provide by the Bill of Rights (such as indigent legal services or habitable jails) or whether they merely offer services needed by the government to "provide for the common defence" or "promote the general Welfare" (Preamble, United States Constitution). If CJA lawyers did have a constitutional right collectively to withhold their services from the government "unless we are granted a substantial increase in our hourly rate," the same novel right could not, in any principled way, be denied a great many others.[19] As the court below recognized, that is a strong reason why no such right should be created.

II. THE COURT OF APPEALS INCORRECTLY HELD THAT, AS APPLIED TO THIS CASE, THE SHERMAN ACT'S *PER SE* PROHIBITION OF NAKED HORIZONTAL PRICE-FIXING AGREEMENTS CONTRAVENES THE FIRST AMENDMENT

As noted above, the court of appeals correctly recognized that the SCTLA boycott fell on the wrong side of the

[19] Before the court of appeals, at least, SCTLA seemed to recognize this fact, maintaining that the legality of its boycott should not turn upon whether its members sought to vindicate the constitutional rights of their clients or sought merely to improve the quality of legal care they received (86-1465 Pet. Br. at 36-37).

line that this Court drew in *Noerr* between the First Amendment rights of competitors and their antitrust responsibilities to the public, and was likewise not a protected "political boycott" within the meaning of *Claiborne Hardware*. In a striking reversal of course, however, the court then considered whether SCTLA's conduct was protected if labeled an "expressive boycott" rather than "lobbying," and if judged by the standards of *O'Brien* rather than *Noerr*. Here the court erred in concluding that such an approach warranted any difference in treatment.

1. At the outset, we think it is doubtful whether the *O'Brien* test applies at all to the SCTLA boycott. In *O'Brien*, the Court upheld a defendant's conviction for wilfully destroying his draft card. The Court assumed, without deciding, that the "alleged communicative element" in defendant's conduct was "sufficient to bring into play the First Amendment" (391 U.S. 376), but it rejected the claim on the merits. The Court articulated a four-part test for assessing the constitutionality of a regulation that affects expressive conduct. Such a regulation, the Court explained, may be justified (*id.* at 377):

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

But while the Court in *O'Brien* recognized that some nonverbal activity may deserve First Amendment protec-

tion as "symbolic speech," it firmly rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (*O'Brien*, 391 U.S. at 376). See also *Texas* v. *Johnson*, No. 88-155 (June 21, 1989), slip op. 6; *Spence* v. *Washington*, 418 U.S. 405, 409 (1974); *Cohen* v. *California*, 403 U.S. 15, 18 (1971). Wherever the line between protected and unprotected activity is ultimately drawn, it seems apparent—if the Court's statement in *O'Brien* is to be meaningful at all—that respondents' price-fixing boycott should not trigger the four-part inquiry mandated by that decision.

The application of *O'Brien* in this context is fundamentally inconsistent with the delicate balance, articulated by this Court, between First Amendment principles and the commands of the Sherman Act. On the one hand, the *Noerr* doctrine and *Clairborne Hardware* give substantial protection to "expressive" activity that might otherwise fall within the broad language of the antitrust laws. At the same time, the Court has carefully confined those cases to their proper sphere, recognizing that "[t]he First Amendment does not 'make it . . . impossible ever to enforce laws against agreements in restraint of trade' " (*Professional Engineers*, 435 U.S. at 697 (citation omitted)). By superimposing the *O'Brien* standard on the Court's existing doctrines, the court of appeals' decision upsets that accommodation.[20]

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[20] Even acts of pure speech that are "an essential and inseparable part" (*Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 502 (1949)) of an antitrust violation lack constitutional protection. In *Professional Engineers*, for example, a district court found that the Society, an organization of professional engineers, had violated the Sherman Act by agreeing to refrain from competitive bidding. The district court accordingly enjoined the organization from adopting any policy statement that stated or implied that competitive bidding was unethical. This Court rejected the Society's contention that such an injunction abridged its First Amendment rights. "Having found the Society guilty of a violation of the Sherman Act," the Court explained, "the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences" (435 U.S. at 697). The Court stated that "[w]hile the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation" (*ibid.*).

Moreover, to the extent that the SCTLA boycott is plausibly analogized to a "strike" it does not, for that reason, secure any special protection under the First Amendment. "The right to strike," this Court has observed, is "vulnerable to regulation" (*International Union, UAW* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 245, 259 (1949)). Consistent with that fact, Congress has, at different times, both expanded (see, *e.g.*, Norris-LaGuardia Act, 29 U.S.C. 104; *Order of R.R. Tel.* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960)), and contracted (see, *e.g.*, Railway Labor Act, 45 U.S.C. 151-188; *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.*, 353 U.S. 30 (1957); and Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. 185(a); *Boys Mkts., Inc.*, v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970)), the right to strike. See also *Dorchy* v. *Kansas*, 272 U.S. 306, 311 (1926). Indeed, strikes by public employees are usually subject to strict regulation, free from First Amendment scrutiny. See 5 U.S.C. 7311(3) (no right to strike against the United States or District of Columbia government); 18 U.S.C. 1918 (criminal penalty for violation of 5 U.S.C. 7311).[21]

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[21] In fact, this Court has held that even a work-stoppage with overtly and exclusively political content falls outside the protections of the First Amendment. In *International Longshoremen's Assoc.* v. *Allied*

It should also not matter that the boycotters "actively courted media coverage of their 'strike' " or that "[t]he media responded with a number of newspaper articles and television stories" (Pet. App. 47a). Respondents were not charged with successful public relations; they were charged with a concerted refusal to deal at prevailing prices. It cannot be that a price-fixer secures the First Amendment protection offered by *O'Brien* simply by garnering favorable publicity.

2. Even if *O'Brien* were properly applied to the facts of this case, however, the *per se* rule against naked horizontal price-fixing satisfies its standards. The court of appeals here recognized that the Sherman Act, including its categorical prohibition of naked horizontal price-fixing without regard to market power, easily met the first three prongs of the *O'Brien* test (Pet. App. 47a). The Sherman Act lies clearly within the constitutional power of Congress, the interest it serves is in no way directed to the suppression of expression, and the interest it promotes is important and substantial. As this Court has repeatedly observed:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the

International, Inc., 456 U.S. 212 (1982), the Court unanimously held that a union's refusal to unload cargoes shipped from the Soviet Union, in order to protest the Russian invasion of Afghanistan, constituted an illegal secondary boycott under the National Labor Relations Act, 29 U.S.C. 158(b)(4). The Court explained that it had "consistently rejected the claim that secondary picketing by labor unions * * * is protected activity under the First Amendment" (456 U.S. at 226). And the court added that "[i]t would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment" (*ibid.*).

> Bill of Rights is to the protection of our fundamental personal freedoms.[22]

In concluding that the Sherman Act's prohibition of price-fixing failed the fourth *O'Brien* criterion, the court of appeals reasoned that the underlying "policies of the antitrust laws" (Pet. App. 48a) (to prevent and eradicate trade restraints that harm competition) could still be achieved if proof of market power were required to determine the legality of every "expressive" price-fixing boycott. The court dismissed the *per se* ban on naked price-fixing as serving "only" (*id.* at 49a) to promote administrative convenience and efficiency in achieving the substantive purpose of the Sherman Act, and held (implicitly) that this governmental interest was so insubstantial that it must yield in the face of a party's desire to use a "*per se* violation of the Sherman Act" to further a lobbying campaign. We disagree.

a. Even if the court of appeals properly characterized the Sherman Act's blanket prohibition on naked horizontal price-fixing as "only" an administrative aid, invalidation of the *per se* rule in this case runs squarely afoul of *O'Brien* itself. *O'Brien* sustained a *per se* requirement that all draft-eligible men possess a draft card, notwithstanding that this requirement was but an "administrative aid" that helped to assure the "smooth and efficient function[]" of the draft (391 U.S. at 382).

That *O'Brien*'s telling result did not turn, as the court of appeals speculated, on the fact that it involved "Congress's effort to raise and maintain an army during a period of international conflict" (Pet. App. 50a), is clear from *United*

[22] *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110-11 (1980), citing *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); see also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398 n.16 (1978).

States v. *Albertini*, 472 U.S. 675 (1985). *Albertini* involved a peacetime challenge to an administrative bar order applied to exclude a former serviceman from a military base "open house." Application of the bar order denied Albertini an opportunity to express his views at the open house as other members of the public were allowed to do. Enforcement of the order was "not 'essential' in any absolute sense to security at the military base," for the government could have fashioned a "less restrictive" means of protecting its interests—such as by "provid[ing] [respondent] with a military police chaperone during the open house" (*id.* at 688). Nonetheless, this Court held that "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. * * * Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech" (*id.* at 688-689). Rather, the Court explained, "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" (*id.* at 689). Applying that standard, the Court upheld the bar order under *O'Brien*.

This Court's holding in *Albertini*, with which no Justice disagreed,[23] contrasts sharply with the sentiment ex-

[23] Three Justices dissented from the majority's conclusion that the statutory prohibition covered the conduct in question, but there was no dispute with the majority's articulation of the proper test to be applied in determining whether the First Amendment, as construed in *United States* v. *O'Brien*, forbids application of a statute to conduct undertaken for the purpose of expressing a point of view. See 472 U.S. at 691-702.

pressed by the court of appeals' statement that "we do not say that administrative convenience may never justify an incidental restriction on expressive conduct" (Pet. App. 50a). *Albertini* leaves no room to doubt that efficacy in achieving important governmental purposes is itself a substantial governmental interest that courts are not free to disregard.[24]

b. The court of appeals' interpretation of *O'Brien* also disregards this Court's admonition that the validity of a law attacked under *O'Brien* should not be judged "solely by reference to the demonstration at hand." Rather, one must consider the outcome if, "absent the [challenged] prohibition," others were to claim the favored constitutional treatment sought by the group before the court. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. at 296-297;[25] accord, *United States* v. *Albertini*, 472 U.S. at 688-89; see also *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981). Such consideration in this case demonstrates that the impact on antitrust enforcement of giving special treatment to the SCLTA lawyers would, in fact, be very broad.

[24] The court of appeals itself recognized that the *per se* rule against price-fixing is an important administrative aid in enforcing the Sherman Act, serving goals of " '[b]usiness certainty and litigation efficiency' " (Pet. App. 19a-22a, citing *Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 344). Although any required showing of market power would necessarily disserve these important interests, the damage done by the court of appeals' holding is compounded by its peculiarly complex definition of market power, discussed in Part III, *infra*.

[25] In *Community for Creative Non-Violence*, the Court denied First Amendment protection under *O'Brien* to homeless persons who, in order to facilitate an expressive demonstration, violated Park Service regulations that forbade camping in Lafayette Park.

The court of appeals purported to limit its holding to the "peculiar facts of this case" (Pet. App. 56a), but the court identified no facts that would permit such a limitation. In effect, the court's opinion accords favored treatment to any price-fixing boycott in which (1) competitors first make "active efforts to appeal to the public for support of their demand"[26] (2) against a governmental target[27] and (3) style their subsequent boycott as a continuation of this effort (*id.* at 50a-51a). Although the parameters of the court's decision are unclear, it may be invoked by the parties to a multitude of actual or threatened price-fixing boycotts that are conducted in public (or easily could be) and that begin with an entirely lawful public effort by conspirators to persuade the government to confer (in the name of the "public interest") whatever benefit they seek.

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[26] The court of appeals also suggested that the issue involved must be a matter of "public debate" (Pet. App. 50a), but nowhere defined that term or identified any First Amendment principle that would allow courts to accord greater rights to lawyers advocating increased public spending on legal care than to any other suppliers urging more government spending for their good or service. A "public debate" test thus does not narrow the "appeal to the public" criterion. We have explained earlier (Part I, *supra*), why a "public debate on constitutional issues" test is also untenable, either to describe the facts of this case, or as a basis for legalizing "expressive price-fixing."

[27] Although the court limits its holding to price-fixing against governmental targets, the logic of that result might not strike future courts or litigants as so confining. The court recognized that the *Noerr* doctrine, which applies to lobbying, did not apply here. Its conclusion that the SCTLA boycott deserved a "measure of First Amendment protection" was based, instead, upon the more general assertion that the boycott was used as a means of "expression." If such a right to fix prices to communicate (deriving from *O'Brien* rather than *Noerr*) were created, future litigants might well invoke it even in defense of "expressive price-fixing" directed at a private target.

A few examples from the Commission's own experience demonstrate the broader implications of the court of appeals' decision. In many states, a small fraction of all licensed physicians treats a large fraction of the indigent consumers who rely on state or federal payments for medical care. These physicians and their colleagues frequently combine to urge increases in Medicaid payments or the like, appealing to the public and invoking the welfare of their indigent patients as a reason to increase physicians' fees. When their lobbying fails, physicians sometimes go further, collectively refusing to provide medical care to indigent patients unless the applicable rates are raised. Fortunately, such concerted price-fixing boycotts, although often discussed, have thus far been infrequent—hardly surprising given that most people have considered them illegal *per se*.[28]

By abrogating *per se* treatment and requiring exhaustive proof of market power as well as the weighing of such power against the expressive goals of a Medicaid boycott (see part III, *infra*), the court of appeals' approach would vastly complicate administrative adjudication of the legality of such restraints. The court's decision would also make

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[28] There are always, however, the intrepid few (*e.g.*, *O'Halloran*, 5 Trade Reg. Rep. (CCH) ¶ 22,543 (FTC Aug. 26, 1988) (FTC consent agreement; alleged concerted refusal by five Rhode Island obstetricians to accept indigent cases absent Medicaid increase); *Thomas L. Looby, M.D., Lee M. Mabee, Jr., M.D.*, 5 Trade Reg. Rep. (CCH) ¶ 22,570 (FTC July 20, 1988) (consent agreement and complaint) (alleged collective withholding of services from state medical college; "expressive boycott" defense raised by party in litigation); *Chain Pharmacy Ass'n of New York, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,676 (FTC Apr. 26, 1989) (consent agreements and complaint) (alleged collective refusal by pharmacies to participate in state prescription payment plan); cf., *e.g.*, Raup, *Medicaid Boycotts by Health Care Providers: A Noerr Pennington Defense*, 69 Iowa L. Rev. 1393 (1984)).

it much harder for state or municipal targets of such boycotts to obtain preliminary injunctions against the participants, because plaintiffs would be obliged to show not merely concerted action and harmful effects, but convincing threshold evidence of market power as well.[29]

Another situation that is often threatened, but rarely occurs because the antitrust laws so clearly forbid it, is the concerted refusal by insurance companies to underwrite business in a jurisdiction that refuses to accord an economic benefit they have lobbied to obtain.[30] Although hundreds of insurance companies do business throughout the United States, often only a small number elect to underwrite certain forms of coverage in a particular locality, such as the District of Columbia. These companies frequently lobby jointly for various legislative benefits or against what they perceive as ill-founded legislative initiatives. Also frequently, insurance companies conduct their lobbying through appeals to the public (for example, by means of newspaper advertisements, explaining how the majority of policyholders would face higher premiums if legislation forbidding discrimination against certain individuals were not rejected). By arguing that a boycott of new business is a means of communicating their point of

[29] Although the court was apparently moved to surmise that some District of Columbia officials encouraged the SCTLA boycott (Pet. App. 54a n.35), a sad irony of its holding is that if the D.C. government (or other state or local entity) wishes to resist the next such boycott, the antitrust laws might no longer help in that effort.

[30] The McCarran-Ferguson Act, 15 U.S.C. 1011-1015, exempts the "business of insurance" from federal antitrust regulation to the extent that it is regulated by state law, but nothing in that Act "shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation" (15 U.S.C. 1013(b)). See generally *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978).

view, insurers could presumably escape *per se* condemnation of their conduct as did the SCTLA lawyers in the court below.[31]

There is, in short, no way to confer the right of "expressive boycott" upon competing lawyers without also conferring it upon insurers, doctors, pharmacies, accountants, engineers, and a multitude of other competitors who seek every day to promote both their parochial economic interests and their vision of the public good in the public arena. That any holding protecting the SCTLA lawyers' conduct here from *per se* liability would necessarily extend far beyond the "demonstration at hand" is, as *Community for Creative Non-Violence* and *Albertini* teach, a reason why application of the *O'Brien* test to the conduct here does not protect it.

3. This case cannot be distinguished from *Albertini* and *Community for Creative Non-Violence* by the court of appeals' puzzling assertion that the Sherman Act's *per se* prohibition of naked horizontal restraints is "not a statutory command" (Pet. App. 49a).[32] The *per se* prohibition against naked horizontal price-fixing agreements is an important, well-established rule of substantive law

[31] And given the difficulty of proving market power as defined by the court of appeals (see Part III, *infra*), dispensation from the *per se* rule might well encourage even such large corporations as insurance companies to engage in "expressive boycotts."

[32] To support this proposition, the court of appeals cited (Pet. App. 49a) the Commission's appellate brief (at 39) and this Court's decision in *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2, 15-16 n.25 (1984). But those sources state only that the *per se* rule promotes goals of law enforcement convenience and efficiency. Many provisions of law are framed to promote efficiency and clarity in achieving some underlying substantive purpose of the legislature (*e.g.*, the requirement to possess a draft card sustained in *O'Brien* itself), a fact that has never been thought to diminish the obligation of citizens to obey, or courts to enforce, such provisions.

that deters antitrust violations and facilitates antitrust enforcement by identifying with precision conduct that is prohibited by the Sherman Act. Although the language of the Sherman Act itself is cast broadly (*e.g.*, "[e]very contract * * * in restraint of trade"),[33] and has required judicial elaboration, this Court has "not wavered" in construing the statutory language to forbid naked horizontal price-fixing without proof of market power. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 347; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 218, 221; R. Bork, *supra*, at 66-67. The language of a statute, as construed unvaryingly by this Court, is surely a "statutory command" that all persons must obey and that courts of appeals must enforce. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (reversing court of appeals for failure to apply *per se* rule to naked horizontal restraints).

[33] Even in the face of a First Amendment challenge, the mere fact that a statute prohibits a broad range of conduct affords no reason for refusing enforcement. See, *e.g.*, *International Longshoremen's Assoc.* v. *Allied International, Inc.*, 456 U.S. at 225 (rejecting First Amendment challenge to statute prohibiting secondary boycotts that Congress had "purposefully drafted in broadest terms"). The court of appeals cited *In re Primus*, 436 U.S. 412, 434 (1978), for the proposition that " '[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs' " (Pet. App. 50a). But *Primus* involved (1) a direct regulation of speech (a ban on solicitation that the state sought to apply to a "letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization") and (2) communication by a lawyer of "an offer of free assistance by attorneys associated with the ACLU * * * * to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than derive financial gain" (436 U.S. at 422). *NAACP* v. *Button*, 371 U.S. 415 (1963), also cited by the court (Pet. App. 49a), is similarly inapposite.

Nor may this case be distinguished from *Albertini* by the court of appeals' assertion that "[t]he antitrust laws permit, but do not require, the condemnation of price fixing without proof of market power" (Pet. App. 49a). This Court has repeatedly held that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output" (*NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 109; see also, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. at 461-462; *Professional Engineers*, 435 U.S. at 692). Of course, the antitrust enforcement authorities have discretion to pursue only those price-fixing conspiracies in which they believe market power exists, just as a statutorily-mandated speed limit leaves a radar patrolman discretion to ticket only motorists caught driving dangerously in excess of the posted speed. However, this does not mean that a reviewing court may second-guess that prosecutorial judgement by requiring a formal demonstration of market power. The validity of the Commission's order "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" (*Albertini*, 472 U.S. at 689).[34]

The court of appeals' proposed suspension of the *per se* rule in this case also cannot be defended by pointing to other contexts in which the Court has revised the categories of trade restraints subject to *per se* condemnation. See, *e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints

[34] In fact, the FTC focuses its resources upon trade restraints in which it believes market power is likely to exist. In the present case, for example, it concluded that a price-fixing agreement involving nearly every D.C. lawyer who made a practice of representing indigent clients involved the exercise of market power. (See Part III, *infra*.)

judged by rule of reason), overruling *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) (vertical territorial restraints *per se* unlawful). Plainly, courts construing the Sherman Act must take account of changed understandings about the competitive effects of certain kinds of restraints. But that does not authorize a lower court to depart from an established *per se* rule because, in its view, some other social good—wholly apart from the statutory purpose of preserving competition—may come of it. See *Professional Engineers*, 435 U.S. at 694-696. At bottom, that is what the court of appeals did in this case.

4. Finally, many areas of law besides antitrust would be adversely affected if the court of appeals' novel reading of *O'Brien* were substituted for this Court's holding in *Albertini*. A brief consideration of such consequences demonstrates why this Court's holding in *Albertini* is far preferable. Many statutes prohibit more than those instances of conduct that cause the substantive harm the legislature seeks to prevent. Such "overinclusiveness" helps make laws "more certain to the benefit of everyone concerned" (*Northern Pac. R. R.* v. *United States*, 356 U.S. 1, 5 (1958)), and thereby allows effective statutory enforcement. If courts may ignore the value of clarity and enforcement effectiveness, citing *O'Brien* to rewrite "overinclusive" laws whenever a party sincerely desires to enhance the appeal of a stalled lobbying campaign by engaging in unlawful conduct, the effects on society would be profound.

To cite the most obvious example, the many federal and state laws categorically prohibiting strikes by public employees or other selected groups, without regard to whether the strikers can be proven to possess market power or to have demonstrably harmed the public interest, could scarcely survive the lower court's reading of *O'Brien*

in this case.[35] Such laws, as construed, typically prohibit any "refusal in concert with others to provide services to one's employer" (*United Fed'n of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 884 (D.D.C.) aff'd mem, 404 U.S. 802 (1971)), just as the Sherman Act categorically prohibits naked price-related refusals to deal by competing entrepreneurs. It could scarcely be contended that the laws against public employee strikes are unconstitutional because that they forbid such strikes *per se* without requiring a particularized showing of the strikers' capacity to inflict harm.

The court of appeals saw this case as one of "first impression" (Pet. App. 56a),[36] in which it was obliged to balance the First Amendment rights of competitors with the antitrust rights of the public. But this Court has already carefully struck that balance in the *Noerr* doctrine which, as the court of appeals recognized, does not protect

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[35] The court of appeals considered it a point strongly in SCTLA's favor that its boycott resembled a "strike" (Pet. App. 50a). But that analogy undermines SCTLA's position, because "there is no constitutional right to strike" (*United Fed'n of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 883 (D.D.C.) (three-judge court), aff'd mem., 404 U.S. 802 (1971)). Any "right to strike" without antitrust consequences that does exist derives only from an express statutory exception to the antitrust laws (15 U.S.C. 17; 29 U.S.C. 52) and other statutory provisions (see p. 27, *supra*). SCTLA has never suggested—nor could it—that such provisions apply to it (Pet. App. 7a n.6).

[36] This is true only in the trivial sense that no court has previously addressed SCTLA's inventive claim that summary condemnation of price fixing is unconstitutional under *O'Brien*. Courts have routinely applied the Sherman Act to "speech" used to effect a restraint of trade. See, *e.g.*, *Professional Engineers*, 435 U.S. at 693-695, ("no elaborate * * * analysis" (and certainly none of market power) required to condemn "on its face" speech in the form of a code of ethics prohibiting engineers from bidding competitively to design "large-scale projects significantly affecting the public safety").

price-fixing boycotts. Just as solicitude for the wish of a former serviceman to express his views at a military base "open house" did not permit a court to suspend a bar order against him (*Albertini*), and solicitude for the wish of homeless people to protest their dire condition did not permit a court to suspend applicable Park Service regulations (*Community for Creative Non-Violence*), so too solicitude for the wish of a lawyers' trade association to advocate a rate increase for its members does not permit a court to suspend operation of the *per se* rule against price-fixing.

Because the Sherman Act's *per se* prohibition of naked price-fixing agreements "promotes a substantial governmental interest that would be achieved less effectively absent the regulation" (*Albertini*, 472 U.S. at 689), *United States* v. *O'Brien* does not require or permit alteration of that prohibition in this case.

III. THE COURT OF APPEALS ERRED BY REQUIRING FURTHER PROOF OF MARKET POWER DESPITE EVIDENCE OF THE BOYCOTT'S ACTUAL DETRIMENTAL EFFECTS ON COMPETITION

The court of appeals' error respecting application of the *per se* rule against public price-fixing boycotts is compounded by its additional holding that, in such cases, the government must prove market power even where the boycott has led to demonstrated anticompetitive effects. The court's ruling on this point contravenes decisions of this Court and would create extensive confusion among businesspersons and antitrust enforcers alike in attempting to fathom when price-fixing agreements are lawful and when they are not.

Where evidence regarding market power is properly required in an antitrust case, its purpose is to enable the court to determine whether a challenged restraint is actually likely to cause anticompetitive effects, *i.e.*, increased

prices or decreased output (*e.g.*, *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 110-111 n.42). Thus, as this Court has recently reiterated, even where market power is arguably an element of the antitrust offense, " 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects' " (*FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-461 (1986) (citing 7 P. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)).

The Commission applied this Court's teaching in holding that, in addition to being *per se* illegal, the SCTLA boycott was unlawful under a rule of reason analysis. The Commission found that the boycott, joined by nearly 100% of all CJA "regulars" (those who made a practice of representing indigent defendants under the CJA), had "dramatically reduced the supply of lawyers to the city's CJA program," had "adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants," and had "forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [lawyers]" (Pet. App. 96a). The Commission also found "a direct causal link between the [lawyers'] coercive boycott and the city government's capitulation to their demands" (*id.* at 97a), noting that the City had increased CJA rates only after the boycott had occurred, and only because it had resulted in an imminent "crisis" in the courts.[37]

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[37] The Commission also affirmed the conclusion of the ALJ "that the [SCTLA lawyers] had market power, *i.e.*, the ability to raise price above the competitive level, *NCAA* v. *Board of Regents*, 468 U.S. at 109)" (Pet. App. 92a n.79). The ALJ based his conclusion on findings that "[SCTLA's] argument that the CJA lawyers lacked the power to

Notwithstanding these findings, the court of appeals hypothesized that because the CJA lawyers' price-fixing boycott was designed to "communicate," the boycott's adverse effects could have resulted from "political" rather than "economic" power (Pet. App. 53a-55a). In the court's view, it was conceivable that "lacking any market power, [SCTLA] procured a rate increase by changing public attitudes through the publicity attending the boycott"[38] and that the reduced supply of lawyers to city courts that attended the boycott merely "reflect[ed] the success of SCTLA's persuasive campaign among other lawyers who were in the same market but were also in political sympathy with [SCTLA]" (*id.* at 53a-55a).

The court of appeals' logic proves too much, for it could just as easily be applied to any publicly conducted boycott.

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create a court emergency and thereby force the District government into passing Bill No. 5-128 is contradicted by the entire record," that "the use of emergency alternatives to the CJA lawyers * * * constituted no meaningful restraint on [their] power," that "no long-term alternative to the CJA lawyers would have solved the emergency situation," and that "without such alternatives, the role of the CJA lawyers as an essential component of the existing system was manifest" (*id.* at 205a-206a).

[38] Contrary to the court of appeals' surmise, the ALJ found expressly that (Pet. App. 194a (footnotes omitted)):

> [w]hile the hoopla organized by SCTLA did attract media attention and editorial support, there is no credible evidence that the District's eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure.

The court of appeals felt it was not required to credit this finding because the Commission had not expressly adopted it in its own opinion (*id.* at 54a). However, the Commission did expressly adopt the ALJ's finding that the SCTLA lawyers had market power (note 37, *supra*), a fact that the court of appeals ignored.

The effect of its new exception would be virtually to swallow this Court's common sense rule that proof of adverse effects obviates proof of market power. Left unreversed, the approach would significantly complicate the litigation of "expressive price-fixing" cases and severely challenge the ability of prosecutors and defense counsel alike to ascertain in advance of full-blown litigation whether any instance of such price-fixing is lawful or not.

The success of any price-fixing boycott depends both upon the continued adherence of those who participate in the agreement, and upon the forebearance of those who, though not themselves parties to any agreement, might "break" the boycott if they elected to provide the good or service in question. Boycotts are often accompanied by public pronouncements from the participants that invoke the public interest in their cause and urge those who are not participating to support those who are. Thus, it will be open to successful boycotters to argue, as plausibly as SCTLA did here, that their success was merely a result of the "persuasive" effect of the boycott's "expressive" component upon those who might otherwise have blunted the boycott's effect. If one ignores, as the court of appeals did, the pragmatic analysis of power and effect performed by the ALJ and Commission, it is hard to imagine how any antitrust plaintiff could ever prove the existence of market power to the court's satisfaction, short of the "exhaustive and time consuming market definition exercise * * * endemic to merger litigation" that the court of appeals expressly disavowed (Pet. App. 55a).[39]

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[39] Indeed, the market power analysis decreed by the court in this case would often be far more difficult and time-consuming than that in most merger cases, which typically involve large markets with comparatively few companies. The typical "expressive price-fixing" case, by contrast, will usually involve a state or local service market (*e.g.*,

Likewise, the court of appeals' refusal to treat the City's payment of a higher legal service price as an adverse effect of the boycott reflects an approach that could be adopted in any case. Whenever the institutional target of a boycott acquiesces in the perpetrators' demands, it is always possible to argue that the target did so in response to "political" rather than "economic" power, and that it considered the boycotters' demands to be "in the public interest" or "politically correct," rather than that the target was "economically" coerced. Having capitulated to a price-fixing boycott orchestrated by a well-organized interest group, government officials might well wish only to announce that the public interest has been served, make peace with the only group of their constituents vitally interested in the matter (the economic interest group that has succeeded in its boycott), and put the matter behind them.[40]

The court of appeals recognized that "[d]istinguishing between the political and economic motives [of the participants in a price-fixing boycott] is a daunting task, even for a reviewing court" (Pet. App. 42a). But the court's decision would as a practical matter impose on antitrust enforcers or boycott victims the far more "daunting" task of proving the motives of nonparticipant bystanders who merely forebear to take affirmative action to break a boycott and the motives of the legislature and other government decisionmakers who capitulate to it—all in order to divine the "real" reason why a boycott succeeded.

Finally, even were the Commission able to intuit how the court of appeals intended it to measure "market power" in this case, its labors would not be at an end. For the court of appeals also instructed the Commission to determine "how much market power is sufficient to justify the condemnation of an expressive boycott" (Pet. App. 56a). The court of appeals did not explain how its command is to be obeyed. Whatever the court of appeals' opinion means, the inquiry it mandates is plainly beyond the competence of any agency or court to perform.

In rejecting, more than ninety years ago, the claim that the legality of price-fixing should turn on the reasonableness of the prices being fixed, Judge (later Mr. Chief Justice) Taft recognized that this inquiry would condemn the courts to "set sail on a sea of doubt" from which they might never return (*United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899)). The court of appeals' untethered application of the *O'Brien* test, and its baffling standard for assessing market power, pose equivalent risks. This Court should reject them.

CJA lawyers, Medicaid doctors, local pharmacies protesting state prescription reimbursement schemes) about which precise data do not exist and are difficult to obtain. Moreover, the number of different entities whose possible inclusion in such markets must be considered will often be enormous, given the court of appeals' apparent view here that the Commission must assess whether the market for indigent legal services included not only those who provide such services at the time of the boycott, but the nearly 14,000 other lawyers who possessed the statutory qualification (D.C. bar membership) to do so. See also, Kovacic, *Illegal Agreements With Competitors*, 57 Antitrust L. J. 517, 535 n.80 (1988) (discussing opinion below and difficulties of measuring market power in public procurement contexts).

[40] No doubt that is one reason why this Court has long held that neither acquiescence nor the knowing "wink" or "tacit[] approval" of government employees or other boycott targets bears on a boycott's legality. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 226-227.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it vacates the decision of the Commission.

Respectfully submitted.

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RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a public boycott aimed at petitioning the legislature, and perceived as political expression by elected government officials, was intended to be reached by the antitrust laws.

2. Whether the antitrust laws should be construed to condemn a legislative petitioning boycott *per se*, without any inquiry into whether the boycott participants did or even could exercise economic coercion.

3. Whether application of a *per se* rule to a legislative petitioning boycott is so much more restrictive of political expression than necessary to advance the general governmental interest in competition as to be barred by the First Amendment.

4. Whether the reasons for barring application of the *per se* rule to a petitioning boycott can be satisfied by a "truncated" rule of reason analysis, which assumes—rather than requiring proof—that the challenged conduct had an anticompetitive effect.

PARTIES TO THE PROCEEDINGS

Petitioner/Cross-Respondent is the Federal Trade Commission. Respondents/Cross-Petitioners, all of whom were petitioners in the proceedings before the Court of Appeals and respondents in the proceedings before the Federal Trade Commission, are the Superior Court Trial Lawyers Association ("SCTLA") and Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison, and Joanne D. Slaight (the "Individual Respondents"). None is incorporated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1198, 88-1393

FEDERAL TRADE COMMISSION,
Petitioner,
v.
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
RALPH J. PERROTTA,
KAREN E. KOSKOFF,
REGINALD G. ADDISON,
JOANNE D. SLAIGHT

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners
v.
FEDERAL TRADE COMMISSION

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT/CROSS-PETITIONER SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

STATEMENT OF THE CASE

This case concerns the Federal Trade Commission's efforts to condemn as a *per se* violation of the antitrust laws the highly publicized "strike" staged by Respondents

and others in 1983.[1] Respondents struck to focus public attention on the need for legislation increasing the statutory maximum rate of compensation for representation of indigent criminal defendants under the District of Columbia Criminal Justice Act, D.C. Code § 11-2601 *et seq.* (1981) (the "D.C. CJA"). The strike was an integral part of a long-running dialogue among the bar and bench, civic leaders, study groups, and the legislative, executive, and judicial branches of the D.C. government. To understand the political context and nature of the strike, that dialogue must be briefly described.

1. Representation of Indigent Criminal Defendants Under the D.C. Criminal Justice Act

In the District of Columbia, the assistance of counsel guaranteed by the Sixth Amendment is provided to indigent defendants through a mixed system comprised principally of government attorneys employed by the

[1] Respondents' challenged conduct is referred to herein as a "strike" because that term was commonly used in the press and by the participants at the time. It was not a strike in the technical sense used in the context of labor disputes, however, and it did not involve a complete work stoppage, since the lawyers continued to handle cases to which they had already been appointed. (C.A. App. 187, 515b.) For simplicity, the term "Respondents" is used to refer to Respondents in No. 88-1198, Cross-Petitioners in No. 88-1393. The following citation forms are used in this brief: "C.A. App." refers to the Joint Appendix used in the Court of Appeals, ten copies of which were lodged with this Court in lieu of a printed Appendix pursuant to the parties' joint Motion to Dispense With Joint Appendix, which motion was granted by this Court on June 5, 1989. "Pet. App." refers to the Appendix filed with the FTC's Petition for Certiorari in No. 88-1198. "FTC Br." refers to the FTC's brief on the merits. Testimony at the hearing before the Administrative Law Judge not included in the Court of Appeals Appendix is cited as "Tr. —— (witness name)." "CX" "RX" and "JX" refer, respectively, to the admitted exhibits offered at the hearing by Complaint Counsel, by Respondents, and jointly. References to the transcript page at which exhibits were admitted are given parenthetically after the exhibit citation.

District's Public Defender Service ("PDS") and private attorneys ("CJA lawyers") compensated under the D.C. CJA.

The D.C. CJA, which was enacted in 1974, created a Joint Committee on Judicial Administration of the District of Columbia Courts ("Joint Committee") with authority to establish maximum rates of compensation not exceeding those established by the federal Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1982 & Supp. 1989) ("federal CJA"). *See* D.C. Code § 11-2604 (1981 & Supp. 1988). As amended in 1970, the federal CJA provided for reimbursement at the rate of $20 an hour for out-of-court time and $30 an hour for in-court time, with an overall compensation limit of $400 per misdemeanor and $1,000 per felony. Pub. L. No. 91-447, § 1, October 14, 1970, 84 Stat. 916. The per-case ceilings, but not the maximum rates, were waivable in certain circumstances. The Joint Committee adopted the federal rates and per-case limits for the D.C. CJA.

The rates thus established were maximum rates. Judges retained full discretion under D.C. Code § 11-2604(d) to award less than the amount requested by CJA lawyers, and frequently did so, generally without stating any reasons for the reduction. (C.A. App. 105-06, 151, 419-21, 448-49, 453-54, 626; *Thompson v. District of Columbia*, 407 A.2d 678 (D.C. 1979).) The maximum rates under the federal CJA and D.C. CJA were not increased from 1970 to the time of the strike in 1983.

2. Efforts of Judicial and Bar Groups to Raise the Maximum Rates of Compensation Under the Criminal Justice Act

Even as it established the federal CJA rates in 1970, Congress recognized that they were low. S. Rep. No. 91-790, 91st Cong., 2d Sess. 14-15 (1970). By 1972, Justice Powell had observed that compensation for rep-

resentation of indigent defendants was "generally inadequate," so that "the majority of persons willing to accept appointments are the young and inexperienced." *Argersinger v. Hamlin*, 407 U.S. 25, 57 n.21 (1972) (concurring opinion). By 1983, it had become obvious that these rates were "woefully inadequate" and "scandalously low." (Tr. 1082 (testimony of John H. Pickering); C.A. App. 324 (testimony of Geoffrey C. Hazard); *see also* Tr. 1451, 1418, 1434 (testimony of Norman Lefstein, an expert on the provision of criminal defense services).) Not only had the Consumer Price Index increased by 140% since 1970, but new bases for procedural and evidentiary motions had substantially increased the time required for investigation, research, motions practice, and trial preparation. As a result, lawyers doing CJA work faced "additional procedural obligations . . . at the very time when the courts (and bar associations) indicated a willingness to consider claims of malpractice" and other sanctions. (Pet. App. 174a-75a; Tr. 1138-42 (Hazard).)

The consensus of expert opinion, as found by the Administrative Law Judge, was that the inadequacy of the CJA rates adversely affected the quality of representation by compelling inordinately large caseloads, discouraging experienced attorneys from continuing to practice CJA work, and depriving CJA lawyers of even the rudimentary secretarial and other support needed to practice law. (Pet. App. 175a-77a.) CJA attorneys typically worked out of their homes or briefcases and did their own typing because they could not afford to do otherwise. (Pet. App. 177a; Tr. 1439-40 (Lefstein); Tr. 646-47 (Perrotta); Tr. 793 (Koskoff); Tr. 952 (Slaight); C.A. App. 263-64 (Slaight).) They could not afford to attend continuing legal education courses. (JX 8 at 82-83 (Tr. 66); JX 10 at 80-81, 100-02, 124-25 (Tr. 66).) These conditions eventually drove the more experienced and capable attorneys, even those initially motivated by a dedication to public service, into more lucrative fields.

(Pet. App. 176a.) The loss of attorneys with two or three years experience was, according to Professor Hazard, "the most pernicious effect" of a low rate. (Pet. App. 176a.)

Concerned that the guarantees of the Sixth Amendment were at risk, judicial and bar groups initiated efforts to amend the 1970 rates as early as 1975. In that year, the "authoritative" report of a joint committee of the Judicial Conference of the D.C. Circuit and the District of Columbia Bar (Unified), commonly referred to as the Austern-Rezneck Report, concluded that the existing rates were not adequate. It found that the low rates of compensation resulted in "reduced services" to clients and noted that "a system which is heavily weighed against the indigent defendant in terms of the compensation that his attorney will receive raises serious questions of equal protection." (C.A. App. 770, 766 (Tr. 608).) The committee recommended that the CJA hourly rate be increased to $40 per hour for time both in and out of court. (C.A. App. 762 (Tr. 608).) The report declared:

> We are mindful that many lawyers practicing under the Act are willing to accept appointments at current rates, but believe that the proposed increase in compensation represents the absolute minimum necessary to attract and hold good criminal lawyers and assure their ability to render effective representation to their clients.

(C.A. App. 771 (Tr. 608).) Nonetheless, the D.C. Council did not act. (Pet. App. 174a.)

In 1982, the report of the D.C. Bar Court System Study Committee again recommended that the CJA hourly rates be increased promptly to at least the level proposed by the Austern-Rezneck committee, and the D.C. Bar adopted a resolution supporting legislation to increase the level of compensation. (C.A. App. 783-85 (Tr. 608).) About the same time, a bill was introduced in the

D.C. Council to increase the D.C. CJA hourly rate to $50. No hearings were held, however, and the bill died in committee. (Pet. App. 178a-79a.)

Contemporaneously, efforts were being made to increase the maximum rates under the federal CJA, which, if successful, would automatically have authorized an increase in the maximum D.C. rates as well. These efforts, spanning several years, were led by the Judicial Conference of the United States, the American Bar Association, and numerous other bar and judicial groups. (C.A. App. 652-732 (Tr. 591, 595, 604-06).) But like the efforts to amend the D.C. CJA, they were unsuccessful.[2]

3. Respondents' Pre-Strike Efforts to Secure Legislation Increasing Maximum CJA Compensation Levels

While these efforts were going on, the CJA lawyers themselves were also lobbying for legislation to increase the CJA maximum rates. Their initial efforts were no more successful. "The response from the Mayor and Council members before September, 1982, was almost unanimous support but no concrete results . . . ." (Pet. App. 179a n.127.) In late 1982, against this background of failed attempts to obtain legislation increasing CJA compensation, several lawyers relatively new to CJA practice, including the individual Respondents in this case, renewed their efforts to obtain such legislation. They did so in large part because they thought it was "the single most important thing" they could do to improve the quality of representation provided to indigent defendants. (C.A. App. 156-61 (Perrotta); *see also* C.A. App. 235-40 (Koskoff), 263-67, 474-77, 480-81 (Slaight), 450 (Stein), 497-98 (Perrotta), 504-05 (Addison).)

[2] In October 1984, about a year after the successful conclusion of the D.C. CJA lawyers' strike, legislation was finally passed, increasing the federal CJA hourly rates to $60 for in-court time and $40 for out-of-court time. (Pet. App. 189a-90a n.161.)

These CJA lawyers began by requesting regular monthly meetings with Chief Judge Moultrie of the Superior Court and Larry Polansky, Executive Officer of the D.C. Courts, about a variety of subjects concerning the improvement of the system for representing criminal defendants. (C.A. App. 162, 528.) One of the subjects repeatedly discussed was how the lawyers could go about getting legislation to increase the rates, and whether the Chief Judge would support such an increase. (C.A. App. 163-65, 206-07.) Both Judge Moultrie and Mr. Polansky stated privately that they believed the CJA lawyers deserved an increase. (Pet. App. 179a.) However, the Chief Judge refused to do anything to support it on the ground that he might have to pass on the constitutionality of any legislation. He told the CJA lawyers that they themselves would have to "generate the political support for it," and indicated that they should contact the D.C. government because it was a city problem, not a court problem. (C.A. App. 164, 207.)

The lawyers then sought to meet with the Mayor, but were received only by his counsel, Herbert Reid. Mr. Reid expressed sympathy for their cause, but sent them back to the D.C. Council and/or the Chief Judge. Mr. Reid stated that the Council would have to act before the Mayor could do anything, and noted that it was politically unrealistic to expect the Mayor to support an increase when the Superior Court was not asking for it. (C.A. App. 166-67, 208-10, 217, 529). The Chief Judge continued to refuse to take a position, however, despite repeated requests for public support. (C.A. App. 167, 210-11, 528-29.)

In early 1983, the CJA lawyers began contacting members of the D.C. Council and their aides, starting with Councilmember Wilhelmina Rolark, who chaired the Council's Judiciary Committee, Council Chairman David Clarke, and Councilmember John Ray. (C.A. App. 211; Tr. 805, 808 (Koskoff).) In March of 1983, Council

Chairman Clarke introduced a new bill to increase the hourly rate, and Councilmember Rolark announced that hearings would be held the following June. When the CJA lawyers learned of this bill and the scheduled hearings, they contacted Councilmember Rolark and her counsel, as well as other council members' staffs, other government officials, bar groups, the PDS, and Judge Moultrie to seek support for the bill. (C.A. App. 211-13, 528-29; Tr. 803-08 (Koskoff); JX 13 at 51-52, 173 (Tr. 66) (Koskoff).) They also wrote to the Mayor seeking support. (RX 66 (Tr. 610); Tr. 694 (Perrotta).)

At the hearings, the CJA lawyers submitted written statements and testified orally. (C.A. App. 216, 565-67 (Tr. 310-11), 575-89 (Tr. 311), 826-39 (Tr. 614), 869-76 (Tr. 615).) Although Chief Judge Moultrie refused to testify (C.A. App. 528-29), the PDS and numerous representatives of bar groups testified or submitted statements. (C.A. App. 303 (Pickering), 381-82 (Isbell), 565-69 (Tr. 310-11), 615-21 (Tr. 242), 802-18 (Tr. 611-12), 840-41 (Tr. 614), 876-81 (Tr. 615).) The D.C. Bar, for example, which rarely takes a position on legislation because it is required to obtain a vote of its members to do so, supported the legislation because of "the importance to the Bar, as well as to the public, of the subject now before the Committee." (C.A. App. 802-03 (Tr. 611), 378-79 (Isbell), 880-81 (Tr. 615).) Bar President David Isbell testified that this was one of only two issues in the bar's history on which it had taken such a position. (C.A. App. 881 (Tr. 615).) Not a single witness or submission opposed the bill on its merits. (C.A. App. 174, 216, 381-82, 564-69 (Tr. 310-11), 575-89 (Tr. 401), 802-95 (Tr. 227-28, 611-15).)

Following the hearing, the CJA lawyers spoke with Councilmember Polly Shackleton and with Council Chairman Clarke. (C.A. App. 216.) They also spoke with Timothy Leeth, a member of the staff of the Subcommittee on the District of Columbia of the U.S. Senate Committee

on Appropriations, to discuss the possibility of federal funding to increase the level of CJA compensation. Mr. Leeth informed them, however, that Congress was sensitive to the District's Home Rule status and would not support an increase until the District itself had acted, through either a request from the Chief Judge of the Superior Court or a bill enacted by the D.C. Council. (Pet. App. 183a.)

It soon became apparent that the hearings on the Council bill to increase the CJA rates were little more than an empty gesture (C.A. App. 173-75, 203, 249-50, 500-01, 512), and that there was no "political steam" behind the bill. (C.A. App. 394 (Isbell).) An aide to Councilmember Rolark told Respondent Koskoff that passage was extremely unlikely because there was no source of funding. (Tr. 809 (Koskoff).) Under the legislative system in the District of Columbia, the prospects for legislation on matters affecting appropriations are heavily dependent on the Mayor's office because the Council is unable to project anticipated revenues and, consequently, cannot independently assess the impact of legislation on the balanced budget required by the act granting Home Rule. (Tr. 1241, 1244, 1247-48 (testimony of former D.C. Council Chairman Sterling Tucker).) Reflecting the Mayor's influence over such legislation, an aide to Councilmember John Ray told Respondents that (in the words of Respondent Addison) "if the Mayor wants you to have it, he can get it." (C.A. App. 252.) But, as noted above, the Mayor's counsel had told the CJA lawyers that the Council would have to act first. (C.A. App. 208-09.)

4. The Strike

Earlier in the year, the CJA lawyers had received some advice from Wiley Branton, then Dean of Howard Law School, that now seemed particularly appropriate. (C.A. App. 171-72, 213-15, 402-05 (Branton).) Dean Branton was knowledgeable about the local political process, had

served on a task force advising the Mayor on the administration of justice and other matters, was chairman of the D.C. Judicial Nomination Commission, and knew the Mayor and every member of the D.C. Council personally. (Tr. 1376-79 (Branton); C.A. App. 213.) He told the CJA lawyers that the chances for an increase in rates were "very dim," and that they needed to generate political support. (C.A. App. 171-72, 213-15, 404-05.) He explained that the problem was not just a lack of funding, and remarked that "if a billion dollars fell on the District of Columbia tomorrow," the lawyers would still not get their increase. (C.A. App. 511.) He explained that there was no organized constituency to lobby for the increase, and that the criminal defense bar was not held in high enough regard by the government or the public at large to generate support as long as the cases were being handled and the system was running smoothly. (C.A. App. 171-72, 214-15, 409, 495.) As Dean Branton later testified:

> In a nutshell I told them . . . that they were going to have to do something dramatic to attract attention in order to get any relief.
>
> And I probably used an expression, you will have to raise hell about this to attract somebody's attention.

(C.A. App. 410.)

In the course of the meeting with Dean Branton, it was mentioned that some CJA lawyers were thinking of a strike to draw public attention to the problem, and Dean Branton indicated that "it may well have to come to that." (C.A. App. 411.) No serious consideration was given by the CJA lawyers to a strike at that time, however, because the lawyers were still hopeful that legislation might be passed by the D.C. Council. (C.A. App. 215.)

After the Judiciary Committee hearings had come and gone with neither substantive opposition nor apparent

progress, however, a number of the CJA lawyers finally concluded that dramatic action was needed to attract public and legislative support. On August 11, 1983, they decided on what they called a "strike"—*i.e.*, they would cease calling in to the CJA offices to volunteer for new appointments.[3] Unlike a classic strike, however, their refusal to volunteer for new appointments did not involve a complete work stoppage. The lawyers continued to handle cases to which they had already been appointed, believing that they "had an absolute duty" and "a moral and a legal obligation and an ethical one to continue representing the people that [they] already represented." (C.A. App. 187, 515b; Tr. 884-85 (Addison), Tr. 962 (Slaight), Tr. 643 (Perrotta).) Moreover, although most of the lawyers stopped calling in to volunteer for new matters, "[n]o one ever refused an appointment." (C.A. App. 515b (Tr. 66).) Respondent Koskoff, for example, accepted a new case for an existing client at the request of a judge, though she declined appointment under the Criminal Justice Act and represented the client *pro bono* instead. (C.A. App. 229-30.)

As with their lobbying efforts generally, a major motive of the strike was to improve the quality of CJA representation. (Pet. App. 226a-27a.) Although most of the lawyers also stood to gain economically from a rate increase, this was not universally true. Respondent Slaight had at the time already formed an intention to

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[3] C.A. App. 515b-16 (Tr. 66). The message of the strike, according to one of the Respondents, was:

> [T]he system had sold our clients out—indeed had sold us out—by saying . . . all we want is to meet the constitutional requirement that you have a lawyer, and that we don't really care what kind of job you do.
>
> So what we said essentially is, we will no longer be a party to the system's desire to only have a warm body beside you. And that, in fact, we cannot in good conscience continue to take cases under the present circumstances.

(C.A. App. 504 (Addison) (Tr. 66).)

leave CJA practice and had stopped taking new appointments. She participated as a leader of the "strike" because she believed "it was the right thing to do" and "felt [she] was doing more for [her] clients by supporting the increase in legislation than [she] had done for the last two and a half years [representing clients under the CJA]."[4] Other CJA lawyers felt that higher rates would be economically detrimental to them because so many new lawyers would be drawn to taking CJA cases that it would make it difficult for lawyers that wished to make a living at CJA work to get enough cases to do so. (C.A. App. 498.)

The strike was scheduled to commence on September 6, several weeks after it was announced. The early announcement, coupled with the fact that many CJA lawyers increased their caseloads in advance of the strike, allowed PDS to reduce its caseload and take other actions in preparation for the strike. (*See* C.A. App. 107-08, Tr. 92, 96-97, 110-12 (Carter); C.A. App. 141-42 (Robinson).)

On August 29, between the announcement and commencement of the strike, several of the lawyers met with the Mayor. The Mayor stated that he supported the legislation, that an increase was long overdue, and that CJA lawyers did useful work at extraordinarily low rates. (C.A. App. 176.) He discussed in general terms how the bill might be funded and explained the District's emergency legislative authority, saying that "if an emergency arises I will have to deal with it." (C.A. App. 176-77, 222-23, 495-96, 507-08.) Respondent Koskoff had never heard of emergency legislation until the Mayor brought

[4] C.A. App. 265-67. She subsequently returned to CJA practice after a stint at a public interest organization in New York. Two of the other three individual Cross-Petitioners, Ms. Koskoff and Mr. Perrotta, left CJA practice shortly after the events in question, reflecting the often rapid turnover among those regularly taking CJA cases (particularly among the younger lawyers).

it up. (C.A. App. 223.) The overall impression conveyed at the meeting, according to Respondent Perrotta, was:

> If I don't have an emergency I can't respond in any kind of emergency way.
>
> . . . [I]t is almost like theater. He has to be able to come in as the rescuer, the man on the white horse and say, well, I am going to solve this huge crisis in the court system . . . .

(C.A. App. 495-96.) The meeting ended with the Mayor smiling directly at Respondent Koskoff and saying, "[Y]ou do what you got to do and I will do what I got to do." (C.A. App. 223-24.) After the meeting, the Mayor and the lawyers held a press conference, which resulted in publication of an article on CJA funding in the *Washington Post*. (C.A. App. 224, 899 (Tr. 616).) The Mayor described himself as "sympathetic" and said that he would discuss with Council members the possibility of providing funds for a raise. But he declared, "My action has nothing to do with what they may or may not do in September." (C.A. App. 899 (Tr. 616).)

The CJA lawyers actively sought media coverage of the strike to create public awareness and support. (C.A. App. 225-29, 253-54, 260-62, 267-69, 461-62, 466-67, 506, 523-27.) A public relations coordinator was designated, two press information kits were prepared, and SCTLA leaders were encouraged to seek out journalists. (Pet. App. 194a; C.A. App. 225-29, 253-54, 260-62, 267-69, 461-62, 466-67, 506, 523-27; Tr. 919-25 (Kline); CX 6-C-J, 13 (Tr. 310-11); RX 97 (Tr. 923); RX 106-A-C (Tr. 618).) The strike was covered widely, not just on Washington television and in local papers, but on national network news, in the *New York Times*, *USA Today*, and *The Economist*. (*See* C.A. App. 900 (Tr. 626), 921-22, 930, 954 (Tr. 619).) The strike generated favorable editorials, including one by the *Washington Post* (C.A. App. 934 (Tr. 619)) and an op-ed article by Harold H. Greene,

former Chief Judge of the Superior Court, who urged: "These lawyers should receive the modest increase they have requested." (C.A. App. 946 (Tr. 619).) The strike also led Chief Judge Moultrie for the first time to state *publicly* that he supported an increase in rates. (C.A. App. 396-97, 948 (Tr. 619), 955 (Tr. 621).)

The strike by CJA lawyers commenced on September 6, 1983, as CJA lawyers had earlier announced it would, and it ended on September 20, two weeks later. (Pet. App. 193a, 204a-05a.) During the strike, newly arrested indigent criminal defendants were represented by PDS attorneys, a dozen CJA regulars, volunteers from the private bar, and law students. (Tr. 96-98, 101-02, 190-97, 222-23 (Carter); Tr. 338-39 (Robinson).) According to petitioner's own witness, proceedings in the Superior Court were conducted at their normal pace (Tr. 561 (O'Neill)), apart from presentments and arraignments, which required an extra hour or so each day to process. (Tr. 568-69, 573-74 (O'Neill).) Although one or two "citation" cases were briefly continued,[5] not a single indigent accused was denied legal representation during the strike. (*See* Tr. 103, 223-25 (Carter).)

5. Passage of Bill No. 5-128

On September 15, in the strike's second week, Frank Carter, Director of PDS, wrote letters to the Mayor, Chief Judge Moultrie, and D.C. Council Judiciary Committee Chairwoman Rolark stating that by the next week, difficulties in providing counsel would "reach a crisis point." (CX 31-A, 32-A, 33-A (Tr. 106).) The letter

[5] "Citation" cases involve misdemeanor offenses such as petty theft and traffic violations. In such cases, trustworthy defendants are released on their own recognizance directly from the precinct after a telephone interview and approval by the pretrial services agency. At the time of release, they are assigned a date to appear in court two or three weeks after their arrest dates. (Tr. 103, 223-25 (Carter).)

also noted the widespread support for the pending bill to increase D.C. CJA rates by PDS and others, and urged the Mayor, Chief Judge Moultrie, and Councilmember Rolark to declare their unified support for the bill. (CX 31-B-C, 32-B-C, 33-B-C (Tr. 106).)

Mr. Carter testified that a principal purpose in writing the letters was to prompt all three branches of government to take immediate action to secure passage of Bill No. 5-128, pending before the Council. (C.A. App. 119-20.) Mr. Carter wrote the "crisis" letters in the context of the "status quo" (C.A. App. 119)—that is, they were predicated on the assumption that nothing further would be done by PDS or the court to get additional volunteers or to compel non-volunteers to take appointments. (C.A. App. 119-24.) At the time, PDS had contacted only a fraction of the law firms and lawyers who might have provided assistance,[6] and a number of lawyers who had handled cases during an earlier 1974 strike testified that attorneys in their firms would have volun-

[6] Prior to the strike, PDS contacted only about 15 of the 40 firms on the D.C. Bar's *pro bono* list in seeking volunteer assistance. (C.A. App. 110-11 (Carter).) In addition, PDS contacted several former U.S. attorneys and former PDS attorneys and approximately 25 to 30 attorneys who accepted appointments during prior emergencies. (C.A. App. 111 (Carter); Tr. 335 (Robinson).) PDS did not seek volunteer assistance from the remaining 25 firms on the bar's *pro bono* list until two days before PDS reached a decision to write the "crisis" letters, with the result that the "crisis" letters were written before PDS knew the extent of additional volunteer assistance that would be available. (C.A. App. 117-19 (Carter).) PDS also did not solicit assistance from firms not on the list, many of which had extensive litigation practices and had provided attorneys in prior emergencies. (C.A. App. 122-23 (Carter).) Nor did PDS request the D.C. Bar to help mobilize volunteer assistance, although Mr. Carter of PDS appeared at a Board of Governors meeting of the bar on September 13. (C.A. App. 118, 123-24, 311-12.) PDS was aware that there were substantial additional sources of volunteer assistance which could have been utilized to avert a "crisis" if the strike persisted. (*See* C.A. App. 120-24 (Carter).)

teered for cases if asked to do so by PDS. (C.A. App. 332-33 (testimony of James F. Rill), 340-42 (testimony of Edward J. Lopata), 371-73 (testimony of James R. Loftis).) Similarly, the court had not exercised its power to order members of the bar (including striking CJA lawyers) to accept appointments.[7] Indeed, some of the CJA lawyers had expressed the view beforehand that if the court chose to exercise this power, it could break the strike. (C.A. App. 451-52.)

The PDS letter provided a basis for the D.C. government to act and to invoke its emergency legislative powers. On September 15, the Mayor called Respondent Kos-

[7] There is no dispute that the court had the power to order the 14,000 members of the bar in private practice in the D.C. area to take appointments. (C.A. App. 127-30.) During an earlier strike in 1974, the court exercised this power to provide counsel for over two months, a far longer period than the two weeks involved in this case. (C.A. App. 125-27 (Carter), 422-28 (Lefstein).) If ordered to appear, large numbers of private attorneys, pursuant to their obligations as officers of the court, would have done so, as they had in the past. (C.A. App. 310 (Pickering), 315-18 (Colbert), 330, 332-33 (Rill), 342 (Lopata), 373 (Loftis).) While the ALJ found that a mandatory *pro bono* program relying on involuntary court appointments would not have been a satisfactory permanent replacement for reliance on voluntary CJA practioners (Pet. App. 158a-60a), uncontradicted expert testimony indicated that a system of court-ordered appointments could have kept the system operating for several months to a year. (C.A. App. 428-29 (Lefstein).) Such a system of appointments resulted in a high quality of representation during the 1974 strike. (RX 55-Z4 (Tr. 608).) The record is also clear that while a substantial percentage of the attorneys sent appointment orders in 1974 did not appear on the date of their notice, very few simply ignored the orders. Rather, because they were given very short notice, a large number notified PDS that they were willing to accept cases but needed their appearance dates continued because of scheduling conflicts. (C.A. App. 422-25 (Lefstein).) The "overwhelming majority" either appeared or were willing to appear. (C.A. App. 434.) Despite these scheduling conflicts, the 1974 "draft" produced enough attorneys to operate the criminal justice system for an extended period until new CJA funds were obtained. (*Id.*)

koff and requested a meeting that evening with her and Respondents Perrotta and Addison. (C.A. App. 231.) "The meeting was friendly. The Mayor shook hands all around and congratulated the SCTLA leadership on the success of the boycott." (Pet. App. 200a; *see* C.A. App. 189-90, 232, 487.) The Mayor explained that since an emergency now existed, the bill could be passed as emergency legislation. (C.A. App. 232-34.) He explained the legislative schedule and stated that he would sign the bill promptly. (C.A. App. 192-93, 232-34, 487-89.) The CJA lawyers asked him when they should return to work, and he responded that "as an old organizer," he would advise them to do so only after the first reading of the bill. (C.A. App. 193, 234, 487-89, 521-22.)

The Mayor wrote to Councilmember Rolark the next day, September 16, stressing "the importance of quality representation for indigent defendants," expressing his support for the pending legislation, and stating that he would "ensure that the courts have adequate resources to cover the increased costs." (Pet. App. 201a-02a.)[8] On

[8] The letter reads in part as follows:

> [B]ecause I believe in the importance of quality representation for indigent defendants and appreciate the significance of the Criminal Justice Act program to the administration of justice in the District, I will, if this legislation is approved by the Council, initiate reprogramming or supplemental actions during FY 1984 sufficient to ensure that the courts have adequate resources to cover the increased costs.
>
> As you know, my position has modified somewhat in the past months. This has been due in large part to your diligence in pursuing the bill, your hard work over the issue of indigent defense, and your support of my efforts to ensure that the Council make a commitment to necessary revenue measures when actions with fiscal impact are taken, [which] has persuaded me that the bill should not be opposed simply because of the financial consequences. I appreciate your and Chairman Clarke's efforts on behalf of this bill, and I look forward to our continued cooperation on matters involving public safety and the administration of justice in Washington, D.C.

(Pet. App. 201a-02a.)

the same day, the Mayor arranged for some of the Respondents to meet with Council Chairman Clarke and Councilmember Rolark. Chairman Clarke conditioned action by the Council upon a vote by the CJA lawyers to end the strike. (Pet. App. 204a.) A favorable vote was taken by the lawyers on September 19; the Council approved the bill unanimously the next day. (Pet. App. 204a.) The Mayor signed the bill, stating in a press release that he did so because "I believe in the importance of quality representation for indigent defendants and believe that this will contribute to the administration of justice in the District." (C.A. App. 961 (Tr. 623).) Three of the Respondents were invited to attend the signing and the cocktail reception that followed. (C.A. App. 193-94, 240, 961 (Tr. 623).)

6. Effects of the Legislation

The increase in the maximum rates under the D.C. CJA resulted in a dramatic increase—approximately a doubling—in the number of attorneys seeking CJA appointments each day as compared with the period before the strike. (C.A. App. 140, 143, 161, 201-02.) Approximately 75 new attorneys not registered with the CJA Office before the strike registered to take appointments between the passage of the bill and the time of hearing. (Tr. 255-56 (Carter); RX 168 (Tr. 1230).) Other attorneys who had previously registered to take CJA cases, but who had reduced the number they were taking or had dropped out of the program entirely before the strike, returned to become active CJA practitioners. (Tr. 858 (Koskoff).) Experts and participants in the system testified without contradiction that the increased rates would improve the quality of legal services provided to indigent criminal defendants. (C.A. App. 160-61, 254-56, 497-98; Tr. 1539-40 (Lefstein); Tr. 1153-54 (Hazard); Tr. 726, 728-29 (Perrotta).)

7. The Political Functions of the Strike

At the hearing before the Administrative Law Judge, there was extensive testimony concerning the political functions of the strike. Then-Bar President David Isbell described the strike as "an effort directed toward bringing effective public attention to the problem of inadequate compensation," and Dean Branton described it as "a form of lobbying" to which the lawyers were "driven . . . because of the economic plight they found themselves in." (C.A. App. 385, 416.) John H. Pickering, who was immediate past president of the D.C. Bar at the time of one of the major study group reports, similarly described the strike as a form of lobbying, noting that its success "simply indicates that eventually everybody understood that there was a legitimate grievance here that impacted severely on the administration of justice and it was time to do something about it." (C.A. App. 293, 309-10.)

There was also uncontroverted testimony at the hearing linking the strike, media coverage, and petitioning efforts. For example, Professor Robert H. Salisbury, a professor of political science at Washington University in St. Louis and an expert on interest group politics (Tr. 979-81), explained that "media coverage is absolutely vital" for those who lack the resources necessary to influence legislation directly and must mobilize public attention. (C.A. App. 285.) Sterling Tucker, former chairman of the D.C. Council, testified that D.C. government officials and Council members regarded the media "as very important in establishing public opinion, building public support, influencing the outcome of decisions, [and] affecting the decision making process generally in and out of government." (C.A. App. 356; *see also* C.A. App. 353-55.) There was also expert testimony that "direct action" is often the only way of attracting media attention for groups lacking status and prestige, and that boycott-like actions are often far better ways of obtaining continuing attention than other actions such as demonstrations. (C.A. App. 285-88 (Salisbury).)

Mr. Tucker also explained why both legislators and strikers would be particularly likely to view the strike as political in the District of Columbia. Noting that most members of the D.C. Council itself had personal experience with "direct action" in the period before Home Rule (C.A. App. 344-50), he stated:

> We have been a part of the civil rights movement. We have been a part of the movement to achieve justice and to acquire [services] in this community. . . . And it is one of the strategies to produce change and we regarded it or I regarded it as such and I am sure that my colleagues did. As a matter of fact, there was never any discussion about it particularly because we just accepted it. That was practically true of all members of the council, including the current Mayor. And I think that probably people in Washington feel and felt freer to use tactics of various kinds and strategies which to some might appear extreme because . . . they know that we understood both the philosophy of such strategies as well as the actions of such strategies. And so they knew that we wouldn't be intimidated by it. I wouldn't regard it as particularly unusual.

(C.A. App. 349-50.)

8. The Proceedings Below

Following a three-week hearing, the Administrative Law Judge filed an initial decision recommending dismissal of the complaint. (Pet. App. 229a.) The FTC, with two members not participating,[9] reversed, holding that the strike was a *per se* antitrust violation under the standards of Section 1 of the Sherman Act, and, in the alternative, an unreasonable restraint of trade if judged under a truncated rule of reason. (Pet. App. 86a-98a.) The Court of Appeals, in turn, reversed and remanded for a determination of whether the striking CJA lawyers possessed market power. While rejecting Respondents' contention that the strike was not within the scope of the antitrust laws under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), (Pet. App. 32a-45a), the court held that where the "special concern of the First Amendment with efforts to petition the government for redress of one's grievances" was at stake, a presumption of anticompetitive effect without proof of market power was more restrictive than essential to furtherance of the government's interest and thus ran afoul of the test set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). (Pet. App. 47a-51a.)[10]

[9] Pet. App. 68a. The FTC's brief is thus quite correct in twice referring to the decision as "unanimous" (FTC Br. 6, 14), since three votes are required for the Commission to issue a final order.

The FTC's petition for reconsideration and suggestion for rehearing *en banc* was denied on October 25, 1988. On January 23, 1989, the FTC petitioned this Court for certiorari and on February 22, 1989, Respondents cross-petitioned for certiorari. This Court granted certiorari on both petitions on April 17, 1989.

SUMMARY OF ARGUMENT

The record in this case establishes beyond question that the CJA lawyers' strike constituted petitioning of a legislature and served the traditional functions of such petitioning. As such, it implicates important First Amendment values which, under standard principles of statutory construction, should not be invaded unless the clear intent of Congress permits no other course. Through the *Noerr* doctrine, this Court has already construed the

[10] In view of this disposition, the Court of Appeals did not rule on the CJA lawyers' contention that, even if a violation could be found, the FTC's order is overly broad and not reasonably related to the remedial purpose of the FTC Act. Should this Court reverse the Court of Appeals on the basis asserted by the FTC, remand to the Court of Appeals for a determination on this issue will be required.

Sherman Act not to reach conduct whose context and nature establish that it is political rather than commercial. That doctrine is fully applicable here: the strike was open and, indeed, highly publicized; it was directly aimed at generating media attention and creating the political climate necessary for the legislature to act; the government officials that were the ostensible targets of the strike made no attempt to discourage the strikers, but instead made clear that action of that kind was necessary to enable them to pass the legislation without incurring undue political risk; and the government retained at all times the power to end the strike, as the strikers were fully aware. In these circumstances, the court below should have required dismissal of the complaint, and insofar as it failed to do so, its decision should be reversed.

Because dismissal should be required without regard to market power, it is not necessary for this Court to reach the questions presented in the FTC's petition in No. 88-1198. If those questions are reached, however, the Court should affirm the Court of Appeals' holding that the CJA lawyers' strike could not be condemned without a showing of market power. That holding may be affirmed on statutory grounds, for a legislative petitioning boycott is not the kind of conduct that almost inevitably has a pernicious effect on competition and lacks any redeeming virtue. The conditions for applying the *per se* rule are therefore not present. Moreover, because a legislative petitioning boycott by parties without market power cannot be economically coercive, such a boycott falls squarely within the policy of *Noerr*.

Alternatively, the decision of the court below may be affirmed on the First Amendment grounds on which it rested. Application of a *per se* rule to the CJA lawyers' strike would restrict political petitioning and expression far more broadly than reasonably necessary to further the governmental interest in protecting competition, and thus must be struck down under the standards announced in

cases such as *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (U.S. June 22, 1989) and *Board of Trustees v. Fox*, 57 U.S.L.W. 5015, 5018 (U.S. June 29, 1989).

The FTC also argues that, even assuming market power must be shown, it may satisfy that burden by a "truncated" rule of reason that relies on the mere fact that the lawyers succeeded in getting the legislature to increase the price for the services they provided. Applying a "truncated" analysis to these facts, however, would ignore the very reason for using a rule of reason in the first place. The FTC's question-begging analysis cannot be accepted.

ARGUMENT

I. THE CJA LAWYERS' STRIKE IS BEYOND THE SCOPE OF THE SHERMAN ACT

A. The Strike Constituted Petitioning and Served the Traditional Functions of Petitioning

It is axiomatic that a statute should be interpreted to avoid potential constitutional problems unless such an interpretation is contrary to the plain intent of Congress.[11] In keeping with this principle, this Court held in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), that genuine efforts to petition the legislature are not within the scope of the Sherman Act,[12] even if the techniques used are indirect and even if they result in incidental direct anticompetitive effects in the marketplace. In so holding, the Court observed that the "right of petition is one of the freedoms pro-

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[11] *Gomez v. United States*, 57 U.S.L.W. 4643, 4644 (U.S. June 12, 1989); *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

[12] The FTC concedes that Section 1 of the Sherman Act, 15 U.S.C. 1, controls its decision. (FTC Br. 5-6 n.7). Accordingly, the relevant antitrust statute in this case is the Sherman Act of 1890, not the Federal Trade Commission Act of 1914. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454-55 (1986).

tected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

The reach of the *Noerr* doctrine depends, of course, on "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1936 (1988). The FTC contends that the nature of Respondents' conduct is such that it implicates no First Amendment values whatsoever. In the opinion accompanying its order, the FTC declared that the strike constituted "disruption of the normal channels of government decision-making . . . wholly unlike lobbying, and the policy reasons for protecting lobbying do not apply to it." (Pet. App. 122a.) Similarly, the FTC maintains here that the strike is not speech at all, let alone political speech, and thus does not warrant even the limited protection accorded by *United States v. O'Brien*, 391 U.S. 367 (1968). (FTC Br. 25-26.) Legislation has been likened to a dance,[18] but the FTC evidently sees no element of choreography here; it finds incomprehensible, and therefore declares nonexistent, a process in which the executive and virtually all of the legislators can agree on the need for a particular measure, yet require an elaborate direct-action campaign, complete with striking lawyers, picket lines, press releases, and television crews, to mobilize the political support necessary for its passage.

Contrary to the FTC's position, however, the record in this case leaves no doubt that the strike constituted legislative petitioning and served the traditional functions of such petitioning. Witness after witness testified about the petitioning functions of the strike (*e.g.*, C.A. App. 270-92 (Salisbury), 308-10 (Pickering), 343-51, 353-62 (Tucker), 384-85, 398-99 (Isbell), 414-16 (Branton); *see also* C.A. App. 182-88 (Perrotta), 227-29 (Koskoff),

[18] *See generally* E. Redman, *The Dance of Legislation* (1973).

253-54, 509-10 (Addison), 451-52 (Hirsch), 461-62 (Pickens)), and not a single witness contradicted them. As Respondent Perrotta observed, the strike was "an opportunity for the community at large beyond the handful of leaders whom we had seen, to respond to our request and to react to it." (C.A. App. 184.) Not only did it give columnists and writers of letters to the editor an opportunity to express their opinions, but

> [t]here was an opportunity for Harold Greene, former Chief Judge of the Superior Court to express himself and there was an opportunity finally even for Judge Moultrie who was so sensitive about potential conflict that he faced [to express an opinion].
>
> * * * *
>
> Judge Moultrie [had] never asked for the money. Finally Judge Moultrie asked for the money in a sense and I think the Mayor is in a position at that point to say, well, now I know that the community is really behind this, everybody is behind it. No one came out against it.

(C.A. App. 185-86.)

The strike also permitted the Mayor and Council members to test the public reaction without unnecessarily risking political capital:

> [F]or all that the Mayor knew in advance, the reaction might well have been, we have serious budget problems, why are you giving money to a bunch of lawyers who are already making $20 an hour? That is twice as much as anyone else makes, of working people in the city.
>
> The reaction might have been the crime rate is already so enormous . . . .
>
> There might have been all kinds of reactions. And it was clear with the focal point of the strike that that was not going to be the reaction and, consequently, [it was] like political theatre in a sense.

(C.A. App. 186-87 (Perrotta).)[14]

Indeed, although the ALJ felt bound by prior FTC precedent to reject Respondents' *Noerr* defense, he could only conclude after surveying this record:

> city officials (and practically everyone else concerned with the criminal justice system) were convinced in 1983 that (a) the optimal economic price was inadequate to satisfy the "political" (i.e., constitutional) requirement of effective representation, and (b) the CJA lawyers were unlikely to achieve higher fees if they continued to rely on communicative political petitioning alone. The perceptions of these local officials (whose judgment is not easily susceptible to second-guessing since they not only must provide for equal justice under law, but also must pay for it) would seem to argue strongly against pressing for an unnecessary and possibly uncertain confrontation between the Commission's antitrust perspective . . . and broader constitutional principles . . . .

(Pet. App. 227a.)

[14] The "testing the waters" function of the strike demonstrates the irrelevance of the ALJ's finding that "there is no credible evidence that the District's eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure." (Pet. App. 194a.) It is unclear what the ALJ meant by "public pressure," since he found, at the same time, that the strike "did attract media attention and editorial support." (*Id.*) Such support was of major political significance, whether or not it constituted "pressure."

It was thus unnecessary, although clearly correct, for the court below explicitly to decline to credit the ALJ's finding concerning public pressure on the ground that it was not specifically adopted, and was therefore rejected, by the Commission. (Pet. App. 54a.) It is also unnecessary to invoke the principle that a reviewing court must examine the evidence critically where there is otherwise a risk that liability will be imposed for constitutionally protected conduct, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 & n.50 (1982), although that principle would clearly be applicable if the ALJ were taken to mean that there was not a significant outpouring of media support. That finding, which the ALJ did *not* make, would have been contrary to the uncontroverted evidence. (C.A. App. 182-88, 285-88, 353-56, 509-10, 921-54 (Tr. 619).)

It is thus clear on the record that the CJA lawyers' strike served the traditional functions of petitioning, and was so perceived by those whose judgments ought to matter most—those being petitioned.[15]

B. The Political, Legislative, and Petitioning Context and Nature of Respondents' Conduct Demonstrate that the Strike Falls Within the Scope of the *Noerr* Doctrine

The court below avoided the FTC's error of assuming that the strike implicated no First Amendment value at all. It acknowledged that "[u]nlike *Allied Tube*, the relevant conduct here did take place in a political context —the legislative arena . . . ." (Pet. App. 37a.) Because the activity in question constituted a "concerted refusal to deal by competitors," however, the court believed that the "nature" of the activity foreclosed *Noerr* treatment. *Id.*

Such use of labels ignores the careful, context-specific approach taken by this Court in *Allied Tube*. That case involved the packing of a meeting of a private standard-setting organization with new members "whose only func-

[15] The petitioning functions of a boycott have previously been recognized by this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15 (1982). This Court there observed that a boycott staged to influence governmental action implicates speech, assembly, association, and petitioning protected by the First Amendment. 458 U.S. at 911. The Court recognized a broad "right of the States to regulate economic activity," but held that it "could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914. The complete prohibition against politically motivated boycotting which the FTC seeks in this case would trench upon First Amendment values no less.

tion would be to vote against" a competitor's proposal. 108 S. Ct. at 1935. The conduct "did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process." *Id.* at 1940. Although the code established by that organization did have an indirect legislative impact in that many state and local governments routinely adopted the code into law with little or no change, it also had direct competitive effects in that the code directly influenced the commercial practices of private certification laboratories, underwriters, electrical inspectors, contractors, and distributors. *Id.* at 1934. In these circumstances, this Court characterized the conduct as "commercial activity with a political impact," and therefore outside of *Noerr*. *Id.* at 1941. Noting, however, that it is

> difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact,

id. at 1941 n.10, the Court cautioned that "our decision today depends on the context and nature of the activity." *Id.* And even the packing of a private standard-setting meeting was found to be "close to the line." *Id.*

Unlike *Allied Tube*, the conduct here was open and notorious, and, indeed, publicity was a central motive and feature of the strike. That alone should counsel caution in applying the antitrust laws. If actions are taken openly, legislatures have ample means at their disposal to control conduct that they believe harmful to the proper functioning of the political process [16] without resorting to

[16] Congress has done so, for example, in the federal election laws. *See Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (upholding in part and striking in part provisions of the Federal Election Campaign Act). In the instant case, the D.C. Council could have used the long period between the strike announcement and its implementation to put substantial pressure on the CJA lawyers. A proposal for a large increase in the PDS appropriations, for example, could have raised the spectre of a major, long-term reduction in the need for CJA services, thus threatening the livelihoods of many of the CJA lawyers. A similar effect might have been achieved had either the Council or the Superior Court instituted a "draft" of lawyers—or even if PDS had undertaken more vigorous efforts to obtain volunteers—thus showing the lawyers that the battle would be a protracted one.

The fact that such tools are available to a legislature demonstrates the speciousness of any suggestion that application of the *Noerr* doctrine to public, petitioning boycotts directed at a legislature would lead to dire consequences. *See infra* pp. 40-42.

a statute tailored, not to that end, but to protecting the functioning of commercial markets.[17] The legislative process is, by nature, rough-and-tumble; as this Court observed in *Noerr*, "no-holds-barred fight[s] . . . are commonplace in the halls of legislative bodies . . . ." 365 U.S. at 144; *see also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (contrasting the scope of acceptable conduct in the legislative and adjudicatory arenas).

Moreover, the special circumstances of this case make clear that the CJA lawyers' strike, unlike the meeting-packing scheme in *Allied Tube*, is far from "close to the line," but instead was very clearly political in nature. The strikers were given the unmistakable political message that they would have to "do something dramatic" to develop support for the legislation. When they announced their strike, the Mayor did not discourage them, but instead told them "you do what you have to do," and explained how the emergency legislative process worked. (Pet. App. 187a.) The lawyers were subject to the full power of the Superior Court, which could have ordered them to take cases. (*See supra* p. 16 n.7.) Indeed, Respondent Koskoff took a case *pro bono* at a judge's request. (C.A. App. 229-30.) Instead of exercising com-

[17] *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 491-97 (1940).

pulsion, "several judges went out of their way to volunteer . . . how pleased they were at [the lawyers'] success." (C.A. App. 187 (Perrotta).) The PDS announced an imminent "crisis" at a time when it had contacted only a fraction of the law firms that might have offered help, and the director of PDS admitted on the stand that one of the principal purposes of doing this was to prompt all three branches of government to take immediate action to pass the legislation in question. (C.A. App. 119-20 (Carter); *see supra* p. 15 & n.6.)

The ALJ described this case as one in which the strikers had the D.C. government's "knowing wink." (Pet. App. 226a.) Though this is an accurate description of the record, it may have been an unfortunate phrase, one which may have led astray both the FTC and the court below. The FTC, for example, cites *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940), for the proposition that a "knowing 'wink' . . . of government employees or other boycott targets" [18] does not bear on a boycott's legality. (FTC Br. 44 n.40.) That argument misses the point. While a government official may not grant an exemption from the antitrust laws that Congress has not authorized, the perception of government officials—especially elected officials—that they are being lobbied rather than coerced certainly casts light on whether the conduct is "political" within the meaning of *Allied Tube*. Just as "a good intention will [not] save an otherwise objectionable [restraint]," yet is relevant where it "help[s] the court to interpret facts and to predict consequences," [19] so too the fact that D.C. officials recognized

[18] Of course, *Socony* had nothing to do with boycott targets, governmental or otherwise; the Court was simply denying government officials the ability to grant unauthorized exemptions from the antitrust laws with respect to ordinary conspiracies to restrain competition in commercial markets. *See* 310 U.S. at 226-27.

[19] *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

and encouraged the political uses of the strike is surely germane to the political "context and nature" *Allied Tube* makes dispositive.

Allied Tube counsels us to consider the *entire* context and nature of the challenged activity. *See* 108 S. Ct. 1939-42 & nn.10, 11. Through this lens, the CJA lawyers' conduct was clearly a "publicity campaign directed at the general public, seeking legislation." *Allied Tube*, 108 S. Ct. at 1936, citing *Noerr*, 365 U.S. at 140-41. As such, it is not reached by the Sherman Act.

II. EVEN IF THE SHERMAN ACT WERE TO REACH RESPONDENTS' STRIKE, SUCH A STRIKE COULD NOT BE CONDEMNED WITHOUT A SHOWING OF MARKET POWER

A. The Antitrust Laws Do Not Reach Petitioning Conduct By Persons Without Market Power

Although the Court of Appeals concluded that the antitrust laws encompass economic coercion of governmental action, and therefore could in principle reach a petitioning boycott, it held that condemnation of the CJA lawyers' strike under the *per se* rule was a broader restriction of First Amendment activity than necessary to further the government's interest in preserving competition, and therefore was forbidden by the First Amendment. (Pet. App. 45a-51a.) In this latter holding, the court was correct, as we explain *infra* at pages 42-46. However, in keeping with the principle that the Court should not reach the constitutional issue if a reasonable construction of the statute will avoid it, we first explain why the *per se* rule should not be applied in this context as a matter of statutory construction.

1. *Conduct Designed Only to Secure Legislation Cannot Be Presumed to Have a Pernicious Effect on Competition and to Lack Any Redeeming Virtue*

This Court has repeatedly emphasized that the *per se* rule should be reserved for those restraints that "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . without elaborate inquiry . . . ." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).[20] A presumption of this kind is reasonable "when surrounding circumstances make the likelihood of anticompetitive [effect] so great as to render unjustified further examination of the challenged conduct." *NCAA v. Board of Regents*, 468 U.S. 85, 103-04 (1984).[21] As the court below observed, such *a priori* judgments "may occasionally be overinclusive, condemning the ineffectual with the harmful"; but this overbreadth is tolerated because the types of arrangements so condemned "rarely, if ever, have redeeming virtues." (Pet. App. 49a.)

The basic reason for outlawing cartels and similar "naked" restraints on price or output is that "[i]n the absence of legal impediments, competitors will often join together in the hope of restricting output and achieving higher prices," much as a monopolist would. P. Areeda, *Antitrust Analysis* 322 (3d ed. 1981). The high price, in other words, is a result of the restricted output, and it can be formally demonstrated that the result is a loss to overall consumer welfare. *See id.* at 13-17.

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[20] *Accord Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8 (1979); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

[21] *Accord Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 n.25 (1984).

The presumption of such a loss cannot be justified, however, in the case of conduct intended to generate public support for legislation. In such a case, the predominant effects upon consumers flow from governmental action, and are likely to be quite different from those usually associated with a cartel. In this case, for example, there is no "demand" for CJA lawyers' services apart from the constitutional command of the Sixth Amendment and the decisions of legislatures, executive branch officials, and courts implementing that command.[22] "Demand" is therefore in large part a function of *political* choices and of the political processes by which those choices are made. If the strike succeeded by triggering public discussion and creating the political climate necessary for the bill's passage, then it had its effect by a politically-driven increase in *demand* for improved quality rather than by a restriction in *supply* by a cartel. To apply a *per se* rule would be to deny that possibility and to insist that, in every case, the effect must be presumed to flow from a cartel-like restriction. Nothing

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[22] The FTC persistently ignores the role of the legislative and executive branches in fulfilling the Sixth Amendment guarantee, arguing that the record fails to show that the pre-boycott rates resulted in significant Sixth Amendment violations. (*See* FTC Br. 22-24.) The issue here, however, is not whether Respondents have proved, at a hearing before an Administrative Law Judge of the FTC, that there have been widespread violations of Sixth Amendment rights, but whether the judicially-created *per se* rule should be used to foreclose a form of communication seeking to vindicate such rights legislatively. The strikers—and "every expert who had studied the problem" (Pet. App. 225a, 227a; *see also* Pet. App. 170a-78a)—*believed* that Sixth Amendment rights were at stake. This Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), imposed no requirement that systematic violations of the constitutional rights of blacks in Claiborne County, Mississippi be proved in court as a prerequisite to political action. The FTC seems to envision a vastly diminished role for the legislature in protecting constitutional rights—a world in which constitutional rights could be vindicated *only* in the courts.

in the antitrust laws requires so constricted a view of how political processes work.[23]

The FTC's repeated incantation of the term "price-fixing"[24] does not change this analysis. As this Court has observed, "easy labels do not always supply ready answers." *Broadcast Music*, 441 U.S. at 8. One can dispute whether the governmental action in this case flowed from persuasion or coercion—and, indeed, that is what the Court of Appeals' market power test was designed to sort out. One *cannot* dispute, however, that the only

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[23] The noted economist Albert O. Hirschman, whose name is well-known to antitrust practitioners as part of the Herfindahl-Hirschman index, once remarked on the aversion of economists to the "messy" concepts needed to understand the political sphere:

> [V]oice [political expression] is just the opposite of exit [individual decisions to stop buying or selling a product]. It is a far more 'messy' concept because it can be graduated, all the way from faint grumbling to violent protest; it implies articulation of one's critical opinions rather than a private, 'secret' vote in the anonymity of a supermarket; and finally, it is direct and straightforward rather than roundabout. Voice is political action par excellence.
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> The economist tends naturally to think that his mechanism is far more efficient and is in fact the only one to be taken seriously . . . .
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> • • • •
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> [T]he decision to voice one's views and efforts to make them prevail are contemptuously referred to . . . as a resort to 'cumbrous political channels.' But what else is the political, and indeed the democratic, process than the digging, the use, and hopefully the slow improvement of these very channels?

A. Hirschman, *Exit, Voice, and Loyalty* 16-17 (1970).

[24] FTC Br. (I), 10, 11, 12, 13, 14, 16, 17, 23, 24, 26, 28, 29, 32, 35-36, 37 n.34, 39 n.36, 40, 42, 43, 44, 45. A notable example of characterization-by-calling-it-so is the first heading in the FTC's argument: "THE USE OF PRICE-FIXING TO LOBBY IS NOT IMMUNE FROM ANTITRUST LIABILITY UNDER THE FIRST AMENDMENT." (FTC Br. 14.)

effect on *price* in the "market" for legal services for indigent criminal defendants flows solely from governmental action, since the price is fixed by statute. That effect on *price* cannot be what this case is about. *See Parker v. Brown*, 317 U.S. 341 (1943). Rather, the issue is whether either the Sherman Act or the *per se* rule reaches the way in which that governmental action was achieved.

We explained in Part I why the Sherman Act does not, in fact, reach the way in which the governmental action was achieved. But even if the Sherman Act were to reach such conduct, and even if "coercion" of the governmental desire for increased quality of representation could be treated as an anticompetitive effect, there would be no *a priori* reason to assume that the CJA lawyers' strike succeeded through such "coercion" rather than through publicity and persuasion. As the concurring opinion below pointed out, "a boycott . . . [can] be either expressive or coercive," and the issue "is determining whether [the lawyers] in fact prevailed because of political appeal or commercial might." (Pet. App. 58a.)

The perversity of conclusively presuming anticompetitive effect, purpose, or coercion in the case of a petitioning boycott is graphically illustrated by this case. The Superior Court had the power to order any of the 14,000 active members of the D.C. Bar in private practice—including the 100-odd strikers themselves—to accept appointments under the Criminal Justice Act.[25] Although it appears that the judges generally refrained from appointing or even requesting the strikers to take cases,[26]

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[25] *See supra* p. 16 n.7.

[26] This may be because the strikers apparently enjoyed considerable support among the judges. Quite a number of the judges attended the CJA lawyers' press conference on the first day of the

one of the individual Respondents took a case during the strike, *pro bono*, at the request of a judge. (C.A. App. 822-23 (Koskoff).) Another stood to gain nothing from increased rates because she had already stopped taking cases in anticipation of leaving CJA practice, yet served as one of the leaders of the strike because she thought it was the "right thing to do." (C.A. App. 265-67 (Slaight).) Other CJA lawyers actually thought an increase in CJA rates would be harmful to their economic self-interest because it would attract more and better lawyers to CJA practice. (C.A. App. 498.) Attracting additional lawyers to CJA practice was articulated by some of the leaders of the strike as being a major purpose of seeking CJA rates. (CX 38-I (Tr. 167); C.A. App. 235-37 (Koskoff), 160-61 (Perrotta).) Finally, as the ALJ found, the targets of the strike, the city officials, were "supportive of the boycotters' demands" and viewed the strike as "the only feasible way of getting a rate increase," which was "supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment." (Pet. App. 226a, 228a-29a.) Such facts might well compel a finding that—regardless of whether the strikers had market power and therefore *could* coerce the government—there was neither anticompetitive effect, nor purpose, nor *actual* coercion here. They surely invalidate any presumption to the contrary.

Thus, the underlying rationale of the *per se* rule itself militates against its application in this case.

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strike, and several went out of their way to congratulate the lawyers on the success of the strike after it was over. (JX 13 at 81-82 (Tr. 66) (Koskoff); C.A. App. 187 (Perrotta).)

2. *Where Market Power is Lacking, a Boycott Whose Sole Purpose is to Petition the Legislature and to Generate Public Support for Legislation Falls Squarely Within the Policy of the* Noerr *Doctrine*

If examination of the *per se* rule itself were not sufficient to caution against its indiscriminate use in the context of a petitioning boycott, consideration of the policies underlying *Noerr* surely would be. *Noerr* teaches that the right to petition the government is a fundamental one, and that an intent to invade it is not to be lightly imputed to Congress. 365 U.S. at 138. As demonstrated above (pp. 23-27), the CJA lawyers' strike constituted political petitioning and served the traditional functions of such petitioning. The only conceivable policy reason for holding *Noerr* inapplicable to a petitioning boycott is that such a boycott could be coercive. But even assuming *arguendo* that the policy of *Noerr* does not extend to economic coercion of governmental action, Respondents simply could not have achieved their political ends through the exercise of economic coercion if they lacked market power. They would have had no ability to do so. The effects of their conduct, then, could only have resulted from the public attention and debate generated by the strike. Hence, any success Respondents achieved would be purely a political success—and that kind of persuasion in the context of the legislative process is at the core of what *Noerr* protects.

The FTC argues that to require proof of market power in a case such as this one is "fundamentally inconsistent with the delicate balance" articulated by this Court in cases such as *Noerr* and *Claiborne Hardware*. (FTC Br. 26.) The FTC fails to explain, however, how the court below strikes that balance less "delicately" than does a *per se* rule—which would condemn alike a strike by all 14,000 active members of the D.C. Bar in private practice, by the approximately 100 lawyers involved in this

case, or by any two of the four individual Respondents, acting in concert only with each other to make a symbolic point. Surely the FTC's rigid view of the boundaries of *Noerr* is not what this Court had in mind when it declared in *Allied Tube* that the entire "context and nature" of the challenged activity must be taken into account.[27]

3. *Withholding Application of the* Per Se *Rule in the Case of Political Boycotts Would Not Require Departure From Basic Antitrust Principles*

In its petition for certiorari, the FTC acknowledged the flexibility that has been required in giving content and boundaries to the *per se* rule, but argued that such flexibility is totally inapplicable here:

> To be sure, this Court has sometimes reinterpreted the Sherman Act to alter the categories of restraints subject to *per se* condemnation. *E.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints). But these changes have always flowed from changes in economic learning about the effect of certain categories of restraints upon competition.

(Petition at 13 n.10.) The FTC's position, in other words, is that the *per se* rule is sufficiently supple to accommodate the shifting tides of economic learning, but not the most fundamental values of the freedoms of expression and petition.[28]

This odd proposition apparently rests on the FTC's misperception that withholding application of the *per se* rule in a case such as this one requires a court to balance the interest in competition against some unrelated social good, contrary to the principle enunciated in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 694-96 (1978).[29] Such is not the case. The issue here is not whether a presumed exercise of market power can be justified by some other social good, but whether the presumption itself has any validity in the political context in which the conduct took place. (*See supra* pp. 32-36.) As Judge Silberman noted in the concurrence below,

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[27] 108 S. Ct. at 1939-42 & nn.10, 11. The FTC's only apparent answer to this is that it will exercise its prosecutorial discretion, which "a reviewing court may [not] second-guess." (FTC Br. 37.) But with respect to the antitrust laws (unlike the speed limits cited by the FTC), the primary protection against harmful misapplication has been construction by the courts, not the talisman of prosecutorial discretion—in part, perhaps, because the antitrust laws are also enforced by private parties.

Moreover, the suggestion that the protection of important constitutional rights should be entrusted to prosecutorial discretion runs counter to the principle that where potential deprivations of such rights are at issue,

> it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use . . . . Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Greene v. McElroy, 360 U.S. 474, 507 (1959) (citation omitted).

[28] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" (Citations omitted).

[29] FTC Br. 38. The right to petition might, in fact, be the rare case in which such balancing would be required, for far from having "no redeeming virtue," political activity—even of a heavy-handed variety—was deemed in *Noerr* to be so fundamental to our system of government that Congress could not have intended, in a law aimed at trade restraints, to restrict it. *Noerr*, 365 U.S. at 140-41. *Cf. Claiborne Hardware*, 458 U.S. at 914 n.48, quoting with approval a lower court statement that "the right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott." For the reasons stated in text, however, this Court need not reach that possibility here.

> Since a boycott has the potential either to persuade or coerce . . . the only proxy we have for whether SCTLA relied on political or commercial power . . . is the degree of market power they enjoy. If they have none, the boycott must have succeeded out of persuasion and been a political activity.

(Pet. App. 60a.)

4. *Application of a Market Power Test Will Not Lead to the Dire Consequences Predicted by the FTC*

The FTC paints the consequences of the Court of Appeals' holding in apocalyptic terms, both within antitrust and beyond. (FTC Br. 33-40.) Its predictions are overdrawn.

In the first place, although the FTC finds it ironic that the federal antitrust laws might not be available to help in suppressing the next petitioning boycott (FTC Br. 34 n.29), it nowhere explains why it is *those* laws that must be invoked. Should this Court hold that a market power test governs on statutory grounds, any government—federal, state, or local—that feels its political processes to be threatened unduly by the spectre of boycotts by the economically powerless will remain free to test the accommodation between First Amendment values and its interest in protecting the purity of its political processes by drawing its own line in a different place.[30]

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[30] This also disposes of the FTC's suggestion that laws prohibiting public employee strikes could not survive the Court of Appeals' holding. (FTC Br. 38-39.) Both the interpretation of Congressional intent and the degree to which the means employed are adequately tailored to the governmental interest to be served vary with the specific statute in question. The FTC's citation (FTC Br. 27-28 n.21) of *International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212 (1982) is inapposite for the same reason, particularly since antitrust liability on the same facts was *rejected*. *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-81 (1st Cir. 1981), *aff'd on separate issue*, 456 U.S. 212 (1982).

Moreover, the possibility that doctors, insurance companies, or others might also seek rule of reason treatment for similar conduct is an argument against a market power test only if it is *assumed* that in virtually all such cases the conduct would have a pernicious effect on competition and lack any redeeming virtue. In many cases, that assumption is untenable (as, for example, where the boycott is too limited in duration or participation to have any effect other than through publicity and persuasion). In other words, the FTC's example simply begs the question and amounts, at bottom, merely to a complaint about the government having to meet its burden of proof.

Finally, the FTC concedes that boycotts of the kind it fears "have thus far been infrequent." (FTC Br. 33.) But this is not because, as the FTC would have it, "most people have considered them illegal *per se*." (*Id.*) Many potential political boycotters probably have never heard of the *per se* rule against group boycotts, if indeed they are even familiar with the antitrust laws. Rather, the rarity of such boycotts reflects the fact that the target—the government—typically exercises a great deal of control over the fate of potential political boycotters, since such boycotters often depend on the government for their livelihood and are generally at its mercy. Consequently, most political boycotts are in fact carried out by picturesque "little people" in the Jeffersonian tradition—independent farmers, gasoline station operators, and the like—who have few alternative means of political expression (C.A. App. 272-73, 286, 291-92 (Salisbury); C.A. App. 415-16 (Branton)), and can hope for sympathetic coverage when they appear on the evening news pouring milk down the drain or otherwise dramatizing their plight. The extent to which such protests rely on sympathy to succeed is poignantly illustrated in the instant case, in which the court refrained from exercising its appointment power, the PDS refrained from contacting many of the law firms that might have offered help in keeping the court system operating, and the Mayor gave the protesters ad-

vice about how he would approach the matter "as an old organizer." (C.A. App. 110-11, 117-30, 193, 234, 310, 315-18, 330, 332-33, 342, 373, 422-28, 487-89, 521-22.)

Thus, regardless of how this Court rules, actions such as the lawyers' strike are likely to remain rare; the government, even without the antitrust laws, is far from powerless; and, as former D.C. Council Chairman Sterling Tucker put it, the government would "probably laugh in their faces" if these lawyers or some other group tried to repeat the strike without a strongly meritorious case. (C.A. App. 366-67.)[31]

B. Application of the *Per Se* Rule to Petitioning Boycotts Would Unnecessarily Restrict Political Expression and Would Therefore Violate the First Amendment

The court below held that application of a *per se* rule to Respondents' petitioning boycott would be more restrictive than essential to the government's interest in preserving competition, and hence barred by *United States v. O'Brien*, 391 U.S. 367 (1968). In this it was clearly correct. For all the reasons set forth above (pp. 38-40), application of the *per se* rule is not only unnecessary to the governmental interest in preserving competition, but is contrary to basic principles underlying the *per se* rule itself.

[31] The infrequency of petitioning boycotts for reasons entirely independent of the antitrust laws also disposes of the fear of the court below that, in the case of parties *with* market power, applying the *Noerr* doctrine would be "the stuff of which economic chaos is made . . . from which the Sherman Act has shielded this country for almost a century." (Pet. App. 45a.) Indeed, there is no indication that in the century *before* the Sherman Act, "economic chaos" engulfed the Republic as a result of political boycotts by powerful groups. The FTC's suggestion that large corporations might be tempted to engage in expressive boycotts (FTC Br. 35 n.31) is belied by the fact that such corporations, which were not thought by the Sherman Act Congress to be shy about expressing their power in other respects, seem to have had no penchant for petitioning boycotts. Rather, the petitioning boycott has traditionally been the tool of the disenfranchised and the powerless. (*See* C.A. App. 272, 279, 286 (Salisbury).)

The FTC challenges this holding, arguing that the *per se* rule makes it easier to find defendants guilty of antitrust violations and that this ease serves administrative convenience and efficiency. It relies on *United States v. Albertini*, 472 U.S. 675 (1985), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), as establishing that administrative convenience is itself a substantial governmental interest that may justify abridgement of First Amendment freedoms. (FTC Br. 30, 31.)[32]

The FTC apparently reads *Albertini* and *Clark* as freeing the government from the need to distinguish the harmless from the harmful unless it can do so at no cost whatsoever. That cannot be the law, however. A complete ban on handbilling is, no doubt, the most efficient way of preventing that activity from contributing to litter, yet this Court has held that more tailored means were constitutionally required. *Schneider v. State*, 308 U.S. 147, 162-63 (1939); *see also Martin v. Struthers*, 319 U.S. 141, 147-48 (1943). To prevent unnecessary restrictions of expression, this Court has consistently required that the government pursue its ends through means "narrowly tailored to serve the government's legitimate content-neutral interests." *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879, 4884 (U.S. June 22, 1989). Thus, even where only the lesser interests served by commercial speech are at stake, there must be

> a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents

[32] The FTC also argues that the strike was not petitioning or communicative activity at all, and hence does not even trigger the *O'Brien* analysis. (FTC Br. 25-28.) This argument may be dismissed out of hand. As demonstrated above (pp. 23-27), the record is replete with evidence of the petitioning and communicative functions of the strike.

> not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' that employs . . . a means narrowly tailored to achieve the desired objective.

Board of Trustees v. Fox, 57 U.S.L.W. 5015, 5018 (U.S. June 29, 1988) (citations omitted). Moreover, "the State bears the burden of justifying its restrictions," and "must affirmatively establish the reasonable fit . . . require[d]." *Id.*

That "fit" cannot be established here. Congress' ends simply do not require the degree of overinclusiveness the FTC seeks. Even where no First Amendment interests are at stake, the *per se* rule is only appropriate where the likelihood that it would correctly identify anticompetitive conduct is so great that further examination is unjustified. *NCAA*, 468 U.S. at 103-04. Given that petitioning boycotts have been a traditional tool of the disenfranchised, rather than the economically powerful (C.A. App. 272-73, 286, 291-92 (Salisbury); C.A. App. 415-16 (Branton)), and given the reasons why, as an economic and political matter, such a boycott can succeed without at all implicating competitive concerns (*see supra* pp. 32-36), there is no reason to believe that a *per se* rule would be correct even in a majority of petitioning boycotts, let alone the overwhelming majority that would be required. In sum, the infringement of expression which application of the *per se* rule would impose is far out of proportion to the advancement of statutory objectives it would serve.

Of course, the government need not show that the rule it has applied is the least restrictive available in judicial hindsight. But there is no hindsight involved here. The rule of reason was no stranger to the FTC when it decided that an entire method of expression and petitioning should be subordinated to the ease of labeling conduct "price-fixing." To the contrary, the rule of reason is the "traditional framework of analysis" under Section 1 of the Sherman Act, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977), and the standard

under which most restraints are analyzed. *United States v. Topco Assocs.*, 405 U.S. 596, 607 (1972). *See also Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988).

Clark and *Albertini* also teach that a court should not arrogate to itself a regulatory role properly reserved to a legislature or delegated to an agency. *See Clark*, 468 U.S. at 299; *Albertini*, 472 U.S. at 689. But this principle has no application here. Unlike *Clark* and *Albertini*, which involved statutes or regulations whose plain language proscribed the challenged conduct, this case involves a statute that is cast in the broadest terms, has always required extensive judicial elaboration, and has purposes that are far removed from the conduct at issue. Determining the scope of the *per se* rule is quintessentially a judicial function, and it is hardly likely that the court below was insensitive to the administrative practicalities of proving an antitrust case.

This Court's recent decision in *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (U.S. June 22, 1989), is instructive. In testing whether a noise regulation burdened more speech than necessary to further the government's legitimate interests, the Court reiterated the principle that "[a] complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* at 4884, quoting *Frisby v. Schultz*, 108 S. Ct. 2495, 2503 (1988). The Court emphasized the limited restriction of expression at issue, noting that the

> guideline does not ban all concerts, or even all rock concerts, but instead focuses on the source of the evils the city seeks to eliminate . . . and eliminates them *without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils.*

57 U.S.L.W. at 4884 n.7 (emphasis added).[33]

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[33] *Rock Against Racism* also notes that if the regulatory scheme had a "substantial deleterious effect" on the speech involved, the

In contrast, the *per se* rule adopted by the FTC would ban *all* expressive boycotts by competitors, no matter how clearly symbolic, no matter how small a fraction of the available suppliers they may represent, no matter how brief in duration their boycott is, and no matter how much power the putative victim may have to end the boycott by legislative or judicial fiat. That such a total ban on politically motivated boycotting is unacceptably overbroad has already been established. In *Claiborne Hardware*, this Court acknowledged "the right of the States to regulate economic activity," yet held that it "could not justify a *complete prohibition* against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." 458 U.S. at 914 (emphasis added). No reason is apparent for the First Amendment to be more tolerant of a "complete prohibition" adopted for the administrative convenience of the FTC.

III. A "TRUNCATED" RULE OF REASON IS NOT APPROPRIATE FOR ASSESSING RESPONDENTS' CONDUCT

The FTC suggests that it might satisfy its burden of showing market power by the mere fact that the lawyers succeeded in getting the legislature to increase the price for the service they provided. (FTC Br. (I), 40-45.) It

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speakers' concerns "would have considerable force." 57 U.S.L.W. at 4885. In light of the statements made by Dean Branton and the Mayor to Respondents prior to the strike, the findings of the ALJ regarding the perceived total ineffectiveness of other means of petitioning, and the testimony of Prof. Salisbury regarding the relative effectiveness of various means of seeking media attention, the deleterious effect of a broad, untailored rule cannot be doubted. (*See* C.A. App. 402-05, 409-11 (Branton); Pet. App. 227a; C.A. App. 285-88 (Salisbury).)

seeks, in other words, to sustain its order on the basis of the only "rule of reason" analysis it has ever undertaken —a "truncated" analysis of the type used in *NCAA v. Board of Regents*, 468 U.S. 85, 113 (1984). (Pet. App. 92a-98a.)

Applying a truncated analysis to these facts, however, ignores the very reason for using a rule of reason analysis in the first place. Unlike the case where a party advances plausible efficiencies to justify an otherwise naked restraint, the political aspects of the conduct here raise the issue of whether there was an adverse competitive effect in the first instance. To treat the legislative increase in price as a "demonstrated anticompetitive effect," obviating the need for a market power inquiry, is simply to beg the question.[34] As the court below noted:

> The normal assumptions regarding cause and effect in an economic market cannot be transplanted wholesale into the political arena. . . . There are reasons to pause before inferring market power from detrimental effects when political power may be the more explanatory variable.

(Pet. App. 53a.)

Indeed, if there was any failing in the Court of Appeals' handling of the market power issue, it was in failing to hold as a matter of law that the record dem-

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[34] Such question-begging appears to have infected the FTC's handling of the market power issue at all levels. The ALJ's opinion, in language omitted from the quotation at FTC Br. 41-42 n.37, stated: "The best proof of the power of the CJA lawyers lies in the fact that the boycott succeeded." (Pet. App. 205a.) The FTC's opinion contains an unexplained statement in a single footnote (cited twice in the FTC's brief at 41-42 nn.37, 38) that "we agree with the finding of the Administrative Law Judge that the respondents had market power." The FTC's citation of *NCAA*, and the context of its opinion as a whole, suggest that it, too, was relying on the legislative increase in the statutory maximum CJA rate for its cryptic statement on market power.

onstrated a lack of market power on the part of the striking lawyers. The CJA lawyers clearly lacked both long-term [35] and short-term [36] market power. In par-

[35] In the long term, it is undisputed that the increase in maximum CJA rates resulted in a dramatic increase in the number of lawyers volunteering to take CJA cases compared to those taking cases before the strike. Undisputed testimony as well as the records of the office responsible for administering the CJA program showed that the number of lawyers calling in to volunteer for CJA cases each day rose substantially the day after the new law was enacted (as compared with the period before the strike) and more than doubled within three weeks. (C.A. App. 140, 143, 161, 201-02.) The Court of Appeals acknowledged this, but noted that the rate increase that drew forth this new entry was substantially larger than that ordinarily used by the Justice Department in defining markets under the merger guidelines. (Pet. App. 52a.) The fact is, however, that those lawyers who had not previously volunteered for CJA cases on a regular basis could and would do so at a higher price. Thus, the only justification for treating legal services rendered by CJA lawyers as a distinct market is that none of the other 14,000 members of the bar were willing to work for such low wages. This is akin to the suggestion rejected in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 621-22 (1977) ("Fortner II"), that market power could be shown by "a willingness to provide cheap financing in order to sell expensive houses."

[36] In the short term, there were approximately 100-200 CJA lawyers who regularly took cases under the D.C. CJA. (Tr. 323, 326, 378-80, 383 (Robinson); JX 13 at 47-58 (Tr. 66) (Koskoff).) At the time of the hearing, approximately 14,000 active members of the D.C. Bar were engaged in private practice. (C.A. App. 121 (Carter), 375 (Isbell).) Over 1,500 members belonged to the section of the bar dealing with civil litigation. (C.A. App. 375.) Approximately 500 private attorneys engaged in an active civil practice on a regular basis in Superior Court, and numerous others practiced there less frequently. (C.A. App. 337-39; 122 (Carter).) Almost 600 attorneys belonged to Division 5 of the D.C. Bar, the section dealing with criminal law and individual rights. (C.A. App. 375.) Because of turnover, many lawyers in the District had prior government criminal experience in the 180-185 lawyer U.S. Attorney's office, the 50-lawyer PDS, the Criminal Division of the Department of Justice, or the Corporation Counsel's office. (C.A.

ticular, the court below erred in its conclusion that the Superior Court's power to appoint any of the 14,000 active members of the D.C. Bar—including the strikers themselves—was not dispositive because, according to the Court of Appeals, "a group that engages in a supply-disrupting boycott against the government should not ordinarily be permitted to defend against an antitrust suit on the ground that the government failed to use its extraordinary powers to relieve the economic pressure they had brought against it." (Pet. App. 52a.) The power of the court to appoint, persuade, or request was unquestionably a part of the "context" of the strike that *Allied Tube* enjoins a court to consider in a case having elements of petitioning: it was known to the lawyers when they embarked on the strike, recognizing that the court could easily break it; it was known to Respondent Koskoff, who took a case at a judge's request but refused compensation; and it was known to the numerous lawyers not regularly involved in CJA practice who would, according to the uncontradicted testimony, have accepted CJA cases had they been asked. (C.A. App. 451-52, 229-30 (Koskoff), 310 (Pickering), 315-18 (Colbert), 330, 332-33 (Rill),

App. 121 (Carter); *see also* C.A. App. 334-37, 385-87; Tr. 1088 (Pickering).)

Many of these lawyers would have volunteered to take CJA cases during the strike if they had been asked—which they were not. (C.A. App. 317-18, 331-33, 341-42, 371-72.) Virtually all of them would have taken cases had they been ordered to do so by the court (C.A. App. 318, 332-33, 342, 373)—as, indeed, would the CJA lawyers themselves. (C.A. App. 452; *cf.* C.A. App. 229-30.) These lawyers, even those without prior criminal experience, could have rendered effective assistance of counsel, aided by PDS training materials. (C.A. App. 310-11, 319-21, 341, 386-87.) Indeed, such lawyers have done so in the past under similar circumstances. (C.A. App. 310-11, 340-41, 373, 375-76, 425-28; RX 55-Z4 (Tr. 608).) In 1974, the D.C. court withstood a strike by using its appointment power for over two months (as compared with the two weeks that the current strike lasted) before the issue was resolved. (C.A. App. 125-27, 422-29.)

342 (Lopata), 373 (Loftis).) This context should have been considered by the court below, and based on that context, the court should have remanded with instructions to dismiss.

CONCLUSION

The judgment of the Court of Appeals should be affirmed insofar as it held that Respondents' conduct could not be condemned without a market power determination, and reversed insofar as it failed to require dismissal of the case.

Respectfully submitted,

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August 1, 1989

RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a legislative petitioning boycott, directed at both furthering the Constitutional rights of indigent criminal defendants and the economic benefit of their "striking" lawyers, is beyond the scope of the antitrust laws.

2. Whether a legislative petitioning boycott, in which the primary motive of the boycotters is to engage in political expression, is beyond the scope of the antitrust laws, even if such conduct causes incidental commercial effects.

3. Whether, if a legislative petitioning boycott is subject to the antitrust laws, it can be found unlawful without proof of anticompetitive purpose or effect.

PARTIES TO THE PROCEEDINGS

Respondents (and Cross-Petitioners), all of whom were respondents in the proceedings before the Federal Trade Commission, include the Superior Court Trial Lawyers Association ("SCTLA"), and Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison and Joanne D. Slaight (the "Individual Respondents"). None are incorporated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1198

FEDERAL TRADE COMMISSION,
Petitioner,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
RALPH J. PERROTTA,
KAREN E. KOSKOFF,
REGINALD G. ADDISON,
JOANNE D. SLAIGHT,
Respondents.

No. 88-1393

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE INDIVIDUAL RESPONDENTS

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

> shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The First Amendment to the Constitution and Section One of the Sherman Act, 15 U.S.C. § 1, are set forth in the Appendix filed with the FTC's Petition for Certiorari in No. 88-1198 at App. 230a, and are hereby incorporated by reference.

STATEMENT OF FACTS

As detailed in the brief filed concurrently in this appeal by the Superior Court Trial Lawyers Association ("SCTLA"),[1] in September 1983, some 100 private attorneys staged a boycott to pass a law. Virtually all were solo practitioners providing voluntary assistance to indigent criminal defendants in the District of Columbia Superior Court under the D.C. City Council's Criminal Justice Act of 1974. D.C. Code Ann. § 11-2601 *et seq.* Many were members of the SCTLA. They were seeking to increase the rates of compensation, legislatively set in 1974, which it was widely conceded provided neither fair compensation to the attorneys, nor adequate representation to their clients. (Tr. 1082 (Pickering); C.A. App. 324; Tr. 1451 (Lefstein)). The boycott was staged as a two week strike during which the striking lawyers continued to represent previously assigned clients, but took no new ones. The strike drew substantial media attention

[1] The broad background to this case is set forth in the Statement of Facts in the SCTLA brief ("SCTLA Br."). To reduce repetition it is hereby incorporated by reference, including all citation forms set forth at note 1. This supplemental statement contains additional facts reflecting the perspective of the four Individual Respondents, Ralph Perrotta, Karen Koskoff, Reginald G. Addison and Joanne Slaight.

and coverage, previously unavailable. The coverage elicited sympathetic public support. Broader public support gave Court officials, the Mayor and the City Council an incentive and opportunity to declare an "emergency," enabling them to make their private support public, and to pass the law.

The strike's only purpose, not in dispute, was to influence the passage of legislation to appropriate more substantial funding to raise the inadequate level of compensation received by the volunteers ("CJA lawyers"), and thereby to improve the quality of legal services provided in the D.C. criminal justice system. Criminal justice experts testified that inadequate funding for legal counsel to indigent criminal defendants, in the District and elsewhere, undermines fulfillment of the government's responsibility for providing effective counsel, a responsibility with which it is charged by the Sixth Amendment to the U.S. Constitution. (C.A. App. 770-71).

In the words of Geoffrey Hazard, Director of The American Law Institute:

> It is a Constitutional question with a capital "C." It is a constitutional question with a small "c." It goes to the question of the social order, the decency with which the least attractive part of our citizenry is treated by authority. It has long been said that a society is known by the quality of its criminal justice. I believe that is true. . . . And the quality, therefore, of criminal justice, the quality of our civilization, is determined in part by the seriousness and substantiality of our provision for representation of indigents. (C.A. App. 326-27).

The strike succeeded. The Council passed legislation increasing the fee paid to CJA lawyers and thereby improved the quality of legal counsel provided to indigent defendants in the Superior Court. It is undisputed that, after the strike, twice as many lawyers volunteered to take

cases. (C.A. App. 140, 143, 161, 201-02). After the City Council had approved the law that was the object of the protest, and after the Mayor had invited three of the Individual Respondents to the signing ceremony and reception that followed (C.A. App. 193-94, 240, 961), the Federal Trade Commission brought this action, alleging that legislative petitioning by strike was *per se* price fixing.

The Individual Respondents were the strike's leaders. Mr. Perrotta was, at the time, President of the SCTLA; Ms. Koskoff was Vice-President; Mr. Addison was Secretary; and Ms. Slaight was Chairperson of the SCTLA's Strike Committee. (Pet. App. 6a, 8a).

All four were relative newcomers to CJA practice, but they had strong commitments to public interest work. Mr. Perrotta, a 1960 graduate of Harvard Law School, entered CJA practice only in 1979 after a varied career drafting Medicaid and child abuse legislation; establishing antipoverty, Head Start, legal services, and neighborhood health programs; and dealing with urban issues. (Pet. App. 148a-149a). Ms. Koskoff graduated from Antioch Law School in 1979 and began accepting CJA cases in 1981; she was active in high school and college in counselling drug addicts. She had been employed as a social worker and in a prison work release program and had been a staff attorney at the Public Defender Service in Pittsburgh. (Pet. App. 149a; Tr. 790 (Koskoff)). Mr. Addison graduated from George Washington University Law School in 1981 and began accepting CJA cases in 1982. He grew up in Southeast Washington and went into CJA practice determined to help those from a similar background. (Pet. App. 150a). Ms. Slaight graduated from Catholic University Law School in 1980 and began taking CJA cases in 1981. Before entering law school, she had been employed by the New York Public Interest Research Group and the California Department of Consumer Affairs. (Pet. App. 150a-151a; Tr. 950 (Slaight)).

There were several reasons why these four individuals assumed an active leadership role. They thought it was "the single most important thing" they could do to improve the quality of representation provided to indigent defendants. (C.A. App. 156-61; see also C.A. App. 235-40, 263-67, 450, 474-77, 480-81, 497-98, 504-05). They also did so because they were young and idealistic and "just didn't know any better." (C.A. App. 258-59).

> I had not been in the system so long that I would think that it wouldn't work, . . . I was idealistic and I just went on into this thinking that I came here . . . to do a good job for [my clients]. (C.A. App. 259).

The Individual Respondents believed that the best way "to upgrade the practice . . . for indigents was to raise the rates" because higher rates "would bring in more lawyers" and eliminate a "sense that any lawyer who walked in off the street, if he was a member of the bar, was not only qualified to take cases but was entitled to have cases." (Tr. 673-75 (Perrotta)).

While the CJA lawyers were not disenfranchised, as were many of their clients, they received little respect as assigned poverty defense lawyers within the criminal justice system. According to Mr. Perrotta:

> There was also a sense that the lawyers were treated by everyone in the system as though they were almost interchangeably in terms of the way they were treated with their clients. That is kind of, that is an interesting phenomenon.
>
> To some extent that is desirable because it means you are identifying with your client and you relate to him and you convey that sense that you identify with him, so it is understandable in those circumstances that you may be treated like him. Of course, it is not nice that even clients are treated that way and they ought not to be but the fact is from the marshals up to the judges, there was a sense that we

were there almost to be punished or at least we were always, there was an expectation that there always ought to be, it was useful to us to always be anxious about the possibility of being punished along with our clients.

* * * *

And there was, I have heard, one judge express, I thought sarcastically, but he was expressing his true feelings, the desire, the wish that he could sentence the lawyer as well as his client, he was so furious at him.

There was that sense and I think that sense is contributed to by the fact that there was a feeling, an atmosphere that we were dependent on the courthouse and cases were being tossed at us like crumbs and we were all scrambling for them to get as many as we could to try to make some kind of decent living.

(C.A. App. 158-60). They were working for an improvement in the system and to them this necessarily meant improving their own circumstances.

Ms. Koskoff testified that "[t]he main purpose of supporting the bill was adequate representation of counsel. . . . We are hoping that when the $35 goes into effect, that it would generate more of an interest from attorneys who had been previously disinclined to come down, and hopefully that will generate some kind of life into the system. And the quality of representation should, I think, become better because of that." (C.A. App. 236). Ms. Koskoff described a two step process:

> The first step [recognizes that] one had to take under the old system an enormous number of cases. . . . So the idea of the bill . . . was that if you or if I, Karen Koskoff, only had to take half of them or two-thirds, that meant the case, because of the hourly rate, so you could work on more per case. . . . But there is a converse to that, that is, that the only way that that can work is if more lawyers are coming down.

> The other part of that is, aside directly from the money, is that. . . [o]ur idea was that if new lawyers were coming into the system it breathes life into a system, makes things move, and that as those new lawyers go through the system and judges get to see them in trial [and through the appointment process] eventually it will have the effect of better appointments, particularly in very serious cases. That is obviously essential. It is essential in any case. That is what all this means. (C.A. App. 236-39).

The Individual Respondents' concern with improving the quality of CJA representation did not end at the close of the strike. As Respondent Koskoff testified, regular meetings with Judge Moultrie continued to discuss "establishing certain competency standards for representation of indigents now, that they have enough people that they can choose from to represent them." (Tr. 838 (Koskoff)).

Nor were the Individual Respondents interested in increasing their yearly income; an increase in the ceiling on annual fees was not sought:

> There were yearly ceilings, and that they had not changed then. So that the assumption was, well, I could still make up to the ceiling each year. So that wouldn't change. It would just be the focus of the work. You would be able to work on less cases and spend more time on each individual case. (C.A. App. 237).

Ms. Slaight joined the strike because

> I didn't feel that I could adequately represent my clients at those rates. . . . Because it was the right thing to do, ... [B]ecause I didn't feel that clients could get quality representation at the rates that were presently in effect, which was $20 an hour and $30 an hour, because the attorneys could not afford to give them the kind of representation that they deserved. . . . I felt that I was doing more for my clients by supporting the increase in legislation than

> I had done for the last two and a half years. (C.A. App. 263-67).

She had already decided to leave the CJA program and Washington law practice and had stopped assuming new cases even before the strike began (C.A. App. 265).

Mr. Addison felt that the low rates

> forced [CJA Lawyers] to take so many cases in order to make a living that we were not able to provide the quality of representation that we thought was Constitutionally mandated and that our clients deserved. . . . [T]he issue was a decreased case load, not a pay raise per se. The pay raise was the mechanism through which the decreased case load would be accomplished. . . . Better conditions for us means better representation for them. There is no way to help our clients without doing something for us. (Tr. 55-56, 118 (Addison)).

The FTC did not rebut this testimony.[2]

Notwithstanding substantial pre-strike efforts, the CJA lawyers were unable to secure legislation. The effort was trapped in two catch 22's. The first involved the Chief Judge of the Superior Court, Judge Moultrie. He expressed private support for the CJA lawyers, but refused to express public support because, he said, at a later point he might have to pass on the Constitutionality of any legislation (C.A. App. 164). The Mayor, through his Counsel, Herbert Reid, said he could not act if the Chief Judge of the Superior Court would not even publicly request him to. (C.A. App. 166-67, 217, 529). The second catch 22 was set by the Mayor and members of the City Council. The Mayor said he could not act until asked to by the City Council (C.A. App. 208-209). From the Council's vantage, however, as stated by one of its

[2] Judge Needelman found that "the record shows that the CJA lawyers sincerely believed that protection of the constitutional rights of their clients was directly related to reducing caseloads, which, in turn, was a function of rate change." (Pet. App. 227a).

spokesmen, because the Council relies on the Mayor for analysis of the fiscal impact of the District of proposed legislation, he had to be the initiator. (C.A. App. 252). Without public encouragement to break those traps no one moved, even though no one in the D.C. government spoke out against legislation to raise the fees (Pet. App. 226a, 228a-229a; C.A. App. 717).

It was becoming increasingly clear that without some form of direct, dramatic action that would try to draw the attention of the media and, through the media, to seek the support of the public, there would be no legislation. (C.A. App. 285-86).[3] The previous, traditional legislative efforts to increase CJA fees were hardly even reported during the 7½ month period from January 1 to August 11, 1983. Only 1 story about the issue was published in the *Washington Post* during this period (on June 13, at p. B2).

On the advice of the late Wiley Branton, then Dean of Howard Law School, (C.A. App. 410-11), and with the "knowing wink" of Mayor Barry,[4] who, when advised of the intent to strike, told the Individual Respondents "you do what you have to do and I will do what I have to do," (C.A. App. 177, 223-24, 515a-b, 517), the CJA lawyers went on strike.

According to Mr. Perrotta, by their action the CJA Lawyers provided "the community at large, beyond the handful of leaders whom we had seen" the opportunity "to respond to our request and react to it." (C.A. App.

[3] According to Sterling Tucker, former Chairman of the D.C. City Council, media coverage is "vitally important" to local politicians in this media-conscious city, and D.C. Government officials and Councilmembers pay considerable attention to the media. (C.A. App. 353-56).

[4] Judge Needelman described the government officials' collective response to the strike as "the buyer's knowing wink," as contrasted with that of a buyer "determined to deal at arms length with the seller." (Pet. App. 226a).

184). The strike was designed to prompt public debate in the popular media and, as a result, provide the necessary public figures with the impetus to take a public position on the CJA rates issue:

> There was an opportunity for Harold Greene, former Chief Judge of the Superior Court to express himself and there was an opportunity finally even for Judge Moultrie who was so sensitive about potential conflict that he faced [to follow suit.]
>
> * * * *
>
> Judge Moultrie [had] never asked for the money. Finally Judge Moultrie asked for the money in a sense and I think the Mayor is in a position at that point to say, well, now I know that the community is really behind this, everybody is behind it. No one came out against it.

(C.A. App. 185-86).

More importantly, the strike provided the D.C. government with a quick and accurate picture of public opinion on the issue. Lacking this prior to the strike, the Mayor and City Council simply would not act:

> [F]or all that the Mayor knew in advance, the reaction might well have been, we have serious budget problems, why are you giving money to a bunch of lawyers who are already making $20 an hour? That is twice as much as anyone else makes, of working people in the city.
>
> The reaction might have been the crime rate is already so enormous. . . .
>
> There might have been all kinds of reactions. And it was clear with the focal point of the strike that that was not going to be the reaction and, consequently, [it was] like political theatre in a sense.
>
> And I think it was a process that everybody understood, that we had to go through and the reason I know and I feel deeply in my bones that that is what

> was happening is that we never got an unkind word from anybody after the strike.
>
> * * * *
>
> And after the strike, several judges went out of their way to volunteer to me how pleased they were at our success. That was true about Judge Moultrie as well as judges generally.

(C.A. App. 186-87).

The strike received broad and sympathetic media attention, from, among others, *The Economist* of London and the CBS Network Morning News. (C.A. App. 900, 921-22, 930, 954). During the 6 week period after the strike was announced, on August 11, 1983, the *Washington Post* and *Washington Times* published a total of at least 25 stories about the CJA legislative effort.[5]

The resulting public support broke both the catch 22 between Judge Moultrie and the Mayor (the Judge was finally able to declare to the Mayor his support for the fee increase), (C.A. App. 396-97, 948, 955), and the

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[5] *Washington Post*

August 12	p. B1	September 9	p. B1
August 22	p. B2	September 10	p. B3
August 27	p. B8	September 12	p. D2
August 29	p. B2	September 12	(a second article)
August 30	p. C1	September 13	p. C4
September 5	p. B2	September 15	p. B1
September 7	p. A1	September 16	p. B1
September 8	p. C9	September 16	p. B1 (a second article)
September 8 (a second article)		September 17	p. B1
		September 19	p. D1

Washington Times

August 11 (C.A. App. 897)
August 12 (*id.* at 898)
September 6 (*id.* at 927)
September 6 (a second article) (*id.* at 928)
September 7 (*id.* at 932)
September 16 (*id.* at 952)

catch 22 between the Mayor and the Council (the Mayor was finally able to write a letter to the City Council requesting passage of emergency legislation). (Pet. App. 200a-202a). During the strike, no indigent accused was denied legal representation (Tr. 103 (Francis D. Carter)).

In the initial decision at trial, Judge Needelman held that the CJA strike did not violate the antitrust laws because it caused "no harm." (Pet. App. 227a). He found that the strike was viewed by City officials responsible for passing the legislation "as the only feasible way of getting a rate increase, which was unpopular with the general public but was supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment." (Pet. App. 228a-229a). Judge Needelman refused to decide the case on the basis of whether the strike was "politically motivated action" or "coercion directed at the 'competitive process,'" recognizing that the FTC's "bright line separation . . . assumes a purity of purpose that may not reflect the actual mixed motivation of lawyers for the indigent." (Pet. App. 226a).

The decision of the FTC reversed Judge Needelman's initial decision, holding that CJA lawyers "coerced" the D.C. government into raising fees in *per se* violation of Section 5 of the FTC Act (Pet. App. 71a, 87a, 92a, 138a). The FTC rejected any notion that the asserted political dimensions of a case involving the provision of effective counsel mandated by the Sixth Amendment "alter the nature [of] paradigmatic examples of restraints of trade." (Pet. App. 92a). The FTC also found the strike illegal under a rule of reason analysis, rejecting, *inter alia*, Judge Needelman's finding that the City was "supportive of the boycotters demands and that the strike was 'accompanied by the buyer's knowing wink'." (Pet. App. 96a).

The Court of Appeals rejected both decisions. It concluded that the strike was primarily motivated by economic concerns, and was therefore "commercial activity

with a political impact." (Pet. App. 44a). As such, the conduct was not totally beyond the reach of the antitrust laws. The Court further concluded, however, that the SCTLA boycott contained elements of expression justifying First Amendment protection. Because of the presence of important First Amendment rights, the Court rejected the FTC's *per se* condemnation of the CJA lawyers' conduct. The Court vacated the order of the Commission and remanded the case for a determination of whether the striking lawyers possessed market power. The purpose of the market power inquiry is to determine whether the D.C. City Council approved the CJA rate increase in response to the exercise of market power, or in response to changes in public attitudes from the publicity generated by the strike.

Judge Silberman, in a concurring opinion, expressed concern with the majority's analysis of the CJA lawyers' "subjective motivation" as a basis for determining whether they were engaging in political speech, because "[t]he setting of reimbursement levels for publicly appointed defense counsel is a political issue [and] petitioners' self-interest does not strip their speech of its political character." (Pet. App. 59a). Instead, he said, the distinction between commercial activity with political impact and political activity with commercial impact should focus on the *means* employed in eliciting a governmental response (*i.e.*, political persuasion or economic power). Nevertheless, he agreed that a market power test was proper to determine whether the strike succeeded due to persuasion or coercion.[6]

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[6] The Court of Appeals did not rule on the CJA lawyers' contention that the FTC's order is overly broad and not reasonably related to the remedial purpose of the FTC Act. If this Court reverses the Court of Appeals and finds the Individual Respondents in violation of the FTC Act, it should remand to the Court of Appeals for a determination on this issue.

The FTC's petition for reconsideration was denied on October 25, 1988. On January 23, 1989 the FTC petitioned this Court for certiorari and on February 22, 1989 respondents cross-petitioned for certiorari. On April 17, 1989, certiorari was granted on both petitions.

SUMMARY OF ARGUMENT

This case involves the government restricting the participation of the Individual Respondents in a boycott (they called a strike) to petition for legislative change. The boycott was aimed directly at promoting the passage of legislation by the District of Columbia City Council. The Individual Respondents led the boycott. Among their motives was a concern with the extent to which their clients were receiving effective assistance of legal counsel as required by the Sixth Amendment to the Constitution. The boycott sought passage of legislation that was intended to, and did, have the effect of increasing the supply of competent attorneys providing legal services under the CJA System and of improving their conditions of employment. This is the first appeal heard by this Court to address the application of the antitrust laws to a legislative petitioning boycott and, if the antitrust laws do apply, to consider whether the appropriate antitrust analysis includes scrutiny of the purpose and effect of the conduct under a rule of reason.

There are two rules, each supported by sound authority and the facts of this case, which lead to the conclusion that the legislative boycott here in issue is not subject to the jurisdiction of the Sherman Act (the applicable antitrust law). The first rule is that a legislative boycott aimed directly at petitioning the legislature is by that fact alone beyond the Sherman Act. The Sherman Act should, as a matter of political history, democratic theory and legislative construction, be construed to exclude such conduct. The second rule is that even if legislative petitioning boycotts are not always beyond the Sherman Act, when the primary motive of the boycotters is to engage in political expression, the incidental commercial

effects of such conduct are outside the Sherman Act, especially where the legislation sought is believed necessary to vindicate the Constitutional rights of a disadvantaged group.

Legislative boycotts are a form of political expression that have played an important role in the history of this nation, especially to provide a means of political access to those in our society who are either economically disadvantaged and/or disenfranchised, and who thereby lack "normal," (C.A. App. 92), means of access. If such political boycotts are subject to the antitrust laws, access to the political process, particularly by the disadvantaged, will be substantially foreclosed. Such a radical step should not be for the courts to take. It should be for the legislature to determine in the first instance when it needs help in protecting itself from petitioning conduct.

To apply the Sherman Act under a rule of reason standard in which market power becomes the surrogate for determining whether a legislative boycott is primarily commercial or political, would seriously damage the process of legislative petitioning and impose an imprecise, prospective standard significantly chilling such petitioning. If, however, the Sherman Act is held to apply to legislative petitioning boycotts, to avoid these mischiefs, a rule of reason must be applied. The strike in this case should be found reasonable because its primary purpose was pro-competitive and it had no significant anticompetitive effect.

ARGUMENT

I. THE CJA LAWYERS' STRIKE WAS LEGISLATIVE PETITIONING, BEYOND THE SCOPE OF THE SHERMAN ACT.

This is the first case, so far as we can determine, in which a federal or state court has sought to apply the Sherman Act to legislative petitioning by boycott,[7] conduct which plays an important and constructive role in the American political process. In so doing, the FTC and the Court below not only made new law, but did so in a way that assumes responsibilities properly belonging to legislatures. Under either of two formulations of the appropriate legal standard, the strike is not subject to the antitrust laws.

The Court of Appeals found that the "immediate purpose" of the strikers was "increasing the price they were paid for their services," and that their motive in improving the quality of legal services available to indigent defendants was "distinctly secondary." (Pet. App. 42a). The Court of Appeals thereupon concluded that a primarily self-interested boycott cannot be political conduct outside the Sherman Act. (Pet. App. 44a-45a). A determination that a boycott is substantially self-interested thereby becomes a surrogate for finding that it is commercial, not political. Behind this reasoning, it appears, is a fear that:

> immunizing all non-violent boycotts aimed at affecting the legislative process [would be] the stuff of

[7] There have been several lower court decisions addressing the applicability of the antitrust laws to governmental boycotts. Virtually all such cases, however, involved the lobbying of non-legislative government officials. Two cases relating to boycotts of legislatures other than the decision below have found them not to be within the ambit of restraint of trade laws. *See NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980), *rev'd on other grounds*, 458 U.S. 886 (1982) (Mississippi restraint of trade statute). *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1300 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) ("*NOW*") (Sherman Act). *See also* n.11, *infra*.

> which economic chaos is made in countries that tolerate coercive political action by industry, and from which the Sherman Act has shielded this country for almost a century. (Pet. App. 45a).

The Court of Appeals ignores that the strike had to have been legislative petitioning first and foremost, because only the legislature had the power to change the CJA rates. It also ignores the fact that the antitrust laws have played little if any role heretofore in restraining "coercive political action" by industry or others, and therefore deserves no credit for the fact that such "chaotic" action has not been a "problem" in American history. The Court's concern begs the critical question: it assumes the Sherman Act has always applied to legislative petioning by boycott if economic pressure is applied, and if the boycott is self-interested, and that courts have never "immunized," (Pet. App. 45a), such conduct. The assumption is false. Conduct not reached by a law requires no immunity from it.

Having wrongly assumed that the Sherman Act must, absent a specific exemption or immunity, reach self-interested legislative petitioning by boycott, both the Court below and the FTC then looked to see whether the *Noerr-Pennington* doctrine goes so far as to immunize self-interested petitioning boycotts based on the imperatives of the First Amendment.[8] Since the *Noerr* Court was not faced with such a boycott, they conclude that a narrow reading of *Noerr* does not insulate the strike. (Pet. App. 32a-45a; FTC Br. 4-7). But the proper question is not whether *Noerr* immunizes or shields the strike.

[8] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-40 (1961) ("*Noerr*"); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("*Pennington*") ("Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose."). Although courts frequently refer to *Noerr-Pennington* immunity (*e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1938 (1988) ("*Allied Tube*"), the doctrine is correctly one of statutory construction. *See Noerr*, 365 U.S. at 132 n.6.

The question is whether the Sherman Act applies to this boycott at all, for if the Act does not apply, then the conduct need not be immunized.

The *Noerr* Court recognized that the Sherman Act should not be construed to conflict with Constitutional principles. *See Noerr*, 365 U.S. at 138 ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."); *id.* at 141 ("Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.").[9]

Contrary to the assumption of the Court of Appeals (Pet. App. 16a), Section 1 of the Sherman Act[10] was never intended to proscribe direct legislative petitioning in the form of a boycott, whether or not the boycotters would benefit significantly if the petitioning were successful.[11] The Court below, finding that the strikers were

[9] *E.g., Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring), *cited in* 3A *Sutherland Stat. Const.* § 74.11 (1986).

[10] In this proceeding, the FTC states that the jurisprudence of Section 1 of the Sherman Act, 15 U.S.C. § 1, controls its decision (FTC Br. 5 n.7). This is accepted by the Court of Appeals. Accordingly, the relevant antitrust statute whose applicability in this case is to be considered is the Sherman Act of 1890, not the Federal Trade Commission Act of 1914.

[11] The Court below refers to several lower court decisions that have applied the antitrust laws to efforts, including boycotts, to "coerce" the government. None of the cases cited by the Court below, however, (Pet. App. 34a n.23) involved legislative petitioning. *E.g. Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982) (alleged illegal influence of local zoning board whose decisions were subject to City Council review), *cert. denied*, 461 U.S. 945 (1983); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150*, 440 F.2d 1096 (9th

economically self-interested, characterized the CJA lawyers' strike as "commercial activity with a political impact" (Pet. App. 44a). But no label can change the undisputed record that the exclusive purpose of the boycott was to promote the passage of a law by a legislative body. The Court of Appeals explicitly accepted that this boycott was aimed at obtaining legislation from the District of Columbia government, (Pet. App. 2a), took place in the "legislative arena," (Pet. App. 37a), and involved political expression. (Pet. App. 46a, 47a). It is irrelevant whether the CJA lawyers pressured the legislature, whether the legislature was also a buyer, or whether the strikers were economically self-interested.[12]

Cir.) (threats and intimidation of State Fair officials), *cert. denied*, 404 U.S. 826 (1971); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971) (false statements to Texas Railroad Commission), *cert. denied*, 404 U.S. 1047 (1972); *United States v. North Dakota Hosp. Ass'n*, 640 F. Supp. 1028 (D.N.D. 1986) (agreement denying contractual price discounts for medical services to Indian Health Services, an agency of the Department of Health and Human Services); *COMPACT v. Metropolitan Gov't*, 594 F. Supp. 1567 (M.D. Tenn. 1984) (private agreement by architects not to compete for public contracts for the Metropolitan Nashville Airport Terminal and the Nashville Convention Center).

[12] It is conceded that the CJA lawyers wanted a living hourly fee for work performed and that many of them believed they stood to benefit directly if legislation to that effect was adopted. But the record amply supports a finding that as to the Individual Respondents, and many of the others, the motive was, more significantly, to bring more and better lawyers into the CJA system to improve the environment in the Superior Court where the lawyers worked, and generally to enable CJA lawyers to provide more effective representation. (*Supra* pp. 6-8). It also supports a finding that improving the fees was, as Professor Hazard testified, directly related to securing the Constitutional right to effective counsel. (*Supra* p. 3). Furthermore, no increase was sought in the maximum annual level of fees the CJA lawyers could receive for taking cases. (Tr. 834 (Koskoff)). The record is less clear than the Court below would see it that the joint action had an anticompetitive purpose. (See *infra* p. 40) Since the FTC and the Court below construe the Sherman Act in a way which adversely

A. American Political History And The Legislative History Of The Sherman Act Show No Purpose To Outlaw Legislative Petitioning By Boycott.

That the Sherman Act is "important to the preservation of economic freedom," as the FTC reminds us (FTC Br. 28-29), and that boycotts *outside the legislative arena* are usually, but not always,[13] proscribed by that law, do not justify the FTC's or the Court's assumption that the Act applies to boycotts which constitute self-interested *legislative* petitioning. The precise scope of the Act's prohibtions is unclear from its face and therefore "courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) ("*Apex Hosiery*").

The Act "was intended to apply existing common law principles to the trusts and other business organizations of the day."[14] Virtually all forms of anticompetitive

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implicates the Individual Respondents' First Amendment rights, this Court is free to undertake a *de novo* review of the factual record. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.50 (1982) ("*Claiborne*"); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

[13] *E.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985).

[14] 1 E. Kintner, *The Legislative History of the Federal Antitrust Law and Related Statutes* 30 (1978). *See, e.g.*, 21 Cong. Rec. 2460 (1890) (remarks of Senator Sherman); *id.* at 3146 (remarks of Senator Hoar). There were four identifiable categories of restrictive trade practices in the common law in 1889, each addressing a different competitive evil. There was the law concerning chartered monopolies, setting limits on state-created monopolies; there was the law against the evasion of market regulations, such as forestalling (selling out of hours), regrating (acting as a middleman, buying and selling in the same market), and engrossing, or cornering the market; there was the law against restrictive contracts; and there was the law against unreasonable combinations in restraint of trade. The fourth category is the one at issue here. Over the preceding 500 years there had been many cases at common law dealing with restrictive combinations. Some dealt with con-

certed refusals to deal, and a few involved collective efforts by workers to raise the price of their labor to private employers. *See generally* Peppin, *Price-Fixing Agreements Under the Sherman Antitrust Law*, 28 Calif. L. Rev. 297 (1940). *See also* Dewey, *The Common-Law Background of Antitrust Policy*, 41 Va. L. Rev. 759 (1955).

[15] *See Apex Hosiery*, 310 U.S. at 498 ("This Court has . . . repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are only those which are comparable to restraints deemed illegal at common law . . . .").

[16] We have reviewed the common law cases cited by Senator Sherman, the cases cited by then Judge Taft in his famous review of the common law in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), Justice Stone's exhaustive opinion in *Apex Hosiery*, 310 U.S. at 469, as well as several scholarly law review articles on the history of the Sherman Act.

conduct that have been held to be violations of the Act can be found as the subject of litigation in pre-Act common law.[15] We have, however, been unable to find a single case before 1890 in which political boycotts of any kind, let alone such boycotts constituting legislative petitioning, provided the basis for antitrust liability, or even for antitrust challenge.[16] Reading the language of the Sherman Act, one is to be "guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911). For this reason alone, protection of legislatures from lobbying combinations should not be considered a concern of the Sherman Act Congress.

The lack of specific reference to legislative boycotts in the Sherman Act is not because Senator Sherman and his colleagues were unaware of the economic pressures on legislatures that could be applied in the context of political boycotts. The late 19th Century was a period of rough and tumble aggressive legislative politics and legislators were constantly subjected to intense econom-

ically-motivated pressures.[17] The legislators of that period were no doubt familiar with the important part such boycotts played in the founding of our nation and thereafter. Boycotts analogous to the CJA lawyers strike, boycotts aimed at influencing legislation in the English Parliament (the legislative sovereign of the colonies), received the support and participation of our founding leaders.[18] In many instances, direct economic benefits

[17] The years leading up to the Sherman Act saw the birth and growth of "lobbying" by big business. Railroads, in particular, resorted to such measures as bribery, providing free passes for transportation, and selling stock to Congressmen at attractive prices. *See* D. Rothman, *Politics and Power, The United States Senate 1869-1901* 199-201 (1966). As Rothman notes, however, "Senators, corporations discovered, were not loyal allies . . . . [W]hatever corruption existed did not settle the fate of legislative questions." *Id.* at 201. By the 1890's, public attitudes about conflicts of interest led to more circumspect behavior by Senators and lobbyists. At the same time, state legislatures had begun to regulate lobbying directly. *See* G. Galloway, *The Legislative Process in Congress* 499 (1953) (reviewing enactment of lobbying laws by Georgia (1877), Massachusetts (1890), Wisconsin (1899), and New York (1905)).

[18] For example, George Washington helped draft an agreement signed by the Virginia House of Burgesses in 1769 protesting English adoption of the Townshend Acts, imposing high duties on imports. J. Flexner, *George Washington: The Forge of Experience (1732-1775)* 312, 327 (1965). In 1774, the First Continental Congress approved the Continental Association, a consumer (import) and supplier (export) boycott agreement to pressure Parliament into relieving the colonies from excessive taxation. A. Schlesinger, *The Colonial Merchants and the American Revolution* 393-473 (1939). Thomas Jefferson drafted the model on which the Continental Association's agreement was based, and Franklin, Madison, John Adams and John Jay were active supporters. D. Malone, *Jefferson and His Time: Jefferson: The Virginian* 137-38, 192 (1948), A. Schlesinger, *supra*, at 220, 415, 416. R. Ketcham, *James Madison: A Biography* 61, 63 (1971). Nor were these revolutionary agreements. The signers affirmed that they petitioned as "his majesty's most loyal subjects" and that their purpose was to achieve the repeal of "several acts of parliament passed since the close of the last war." I *Journals of the Continental Congress 1774-1789* (W.C. Ford ed. 1904).

were derived by such boycotters as George Washington, Thomas Jefferson, and James Madison.[19]

Boycotts promoting legislation have also been a part of the legitimate political heritage of our nation since its foundation. Before the Civil War, abolitionists organized a boycott of goods produced by slaves. H. Laidler, *Boycotts and the Labor Struggle* 55 (1913) and, at approximately the time of Sherman Act passage, The National Consumers' League promoted "white-list" boycotts of "sweat-shop" department stores. *Id.* at 33-35. At the same time, prohibitionists were boycotting liquor dealers. *Id.* at 55. These boycotts were not, apparently, subjected to common law challenge.

With this historical background, and with the absence of concern with economically self-interested political boycotts in the pre-Act common law, there is no basis for the FTC or the Court below to have assumed that the Act was intended to treat legislative boycotts as a commercial evil. On the contrary, portions of the Sherman Act debates provide support for the proposition, endorsed by this Court in *Apex Hosiery*, that the Sherman Act was intended to reach commercial restraints in commercial markets, *Apex Hosiery*, 310 U.S. at 502-03, not boycotts aimed at moral-public policy issues, 21 Cong. Rec. at 2658-59 (Mar. 26, 1890) (remarks of Senators Wilson, Hoar and Sherman relating specifically to temperance boycotts of saloons),[20] or most disputes over employment.[21]

[19] For example, many non-exportation agreements contained provisions divesting courts of their ability to hear cases involving foreclosure based on debts colonials owed to English creditors. George Washington, concerned about the debt attaching to his own estate, explicitly favored provisions against exportation to frustrate foreclosures. J. Flexner, *supra* n.18 at 312, 327. Non-exportation agreements also kept precious metals within the U.S. market, to the advantage of some dealing in them. C. Andrews, *Boston Merchants and the Non-Importation Movement* 199 (1919).

[20] *See also NOW*, 620 F.2d at 1302-09.

[21] The FTC points out that to the extent the CJA lawyers are employed by the District of Columbia when they participate in the

B. Political Boycotts Like The Strike Play An Indispensable Role In The Legislative Process In Our Democracy.

The FTC considered the strike a "disruption of the normal channels of government decision-making [that] is wholly unlike lobbying, and the policy reasons for protecting lobbying do not apply to it" (Pet. App. 122a). They reveal a misunderstanding of the legislative process. That process is fundamentally different from administrative and judicial functioning. The legislative process was designed to deal with the intense political pressure by various interest groups which the exercise of power invites and requires. The very nature of the legislative process encourages competing commercial interests to attempt to gain economic advantages through legislation. The legislative branch of government was perceived by the framers as being the forum in which interest groups, in the pursuit of their narrow, economic self-interest, would drive the engines of government:

> "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations . . . . The regulation of these various and interfering interests forms the principal task of modern legisla-

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CJA system, they are prevented by statute (5 U.S.C. § 7311(3)) from striking (FTC Br. 27). It should be noted that the relevant statute cited by the FTC is not the Sherman Act. The legislature is manifestly capable of passing legislation, where necessary, to deal with disruptive conduct, without the aid of Sherman Act enforcement. (*Infra* p. 36). Nothing better illustrates the FTC's misapprehension of the scope of the antitrust laws than its citation (FTC Br. 18 n.13) of *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982), for its holding that the First Amendment does not protect an expressive boycott from application of a Congressional enactment specifically aimed at secondary labor boycotts. The FTC fails to mention that the application of the *antitrust* laws was *rejected* by the Court of Appeals, for reasons present here. *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-81 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982).

> tion and involves the spirit of party and faction in the necessary and ordinary operations of government.[22]

Because the Constitution grants to Congress the power to tax and to appropriate funds, much of the legislative process revolves around self-interested factions pressuring Congress to promote various economic activities through tax and fiscal policies.[23] Those who participate in the process almost certainly have the most direct, economic self-interest in the outcome. Indeed citizens driven by personal economic motive "provide much of the information upon which the government must act." *Noerr*, 365 U.S. at 139. Although "corruption" of the legislative process through, for instance, bribery, can be properly regulated through specific statutes, narrowly drawn to address the offending conduct (*e.g.*, 18 U.S.C. § 203), petitioning boycotts have not been so singled out.

Legislators are used to self-interested pressure and threats. The process is ofen described as "no-holds-barred." *Noerr*, 365 U.S. at 144. Those with money often threaten to withhold it, or give it to a rival, if dissatisfied with a legislator's position. Those who appear to control a group of voters often threaten the loss of voter support. Those with access to the media frequently threaten negative publicitv. It is rare indeed where those whose onlv resource is their time and ability to work, mav threaten to withhold that modest resource to promote public debate and legislative action. Individual CJA lawvers threatening to strike in isolation would not have been listened to any more than if they had only been

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[22] *The Federalist* No. 10, at 79 (J. Madison) (C. Rossiter ed. 1961). The legislative process, for example, tolerates misrepresentations to government officials. Courts or administrative agencies are not structured for such rough political tactics. *E.g. California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.").

[23] Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 Duke L. J. 618, 654.

permitted to employ the "normal" forms of political speech, less dramatic and pressuring than a strike, forms which had been ignored for the preceding 8 years. " 'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' " *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), (quoting, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)); *accord Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 296 (1981) ("There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them."). It is a misapprehension of the legislative process to view this strike or any similar petitioning boycott as any more threatening to legislators than the more powerful threats with which they routinely deal.

As regularly elected public officials, legislators must be alert to public opinion, skilled in recognizing what their constituents want and adept at shaping that opinion and deflecting unwelcome lobbying pressure. They find or invent conflicting interests and, by using techniques such as the catch 22's used by the politicians with the CJA lawyers, (*supra* pp. 8-9), deflect responsibility until public support is established. As former D.C. Council Chairman Sterling Tucker observed, if the CJA lawyers had tried to seek an excessive fee increase by threatening a second strike, the D.C. government would "probably laugh in their faces." (C.A. App. 366-67).

The Court of Appeals points out that "[m]ore than one-fifth of the gross national product is purchased by government entities with money derived from legislative appropriations." (Pet. App. 45a). It is true that government agencies often act as ordinary buyers in commerce for products and services. Virtually all government procurement is made by executive or administrative agencies under non-specific appropriations which give them the responsibility for determining the price to pay. Legislatures, too, have administrative personnel to buy light bulbs and contract for food service. Such procurement,

however, almost never raises legislative issues.[24] Conspiracies to cheat the government, through, for example, predatory conduct,[25] do not involve legislative petitioning. Unlike this case, such joint activity is not itself political, nor is it aimed at affecting the legislative process.

In the ordinary procurement situation, bureaucrats typically lack political power to resist a supplier trade restraint. Their function is largely commercial.[26] Here, the legislature was the governmental body that had the power to address the strikers' issues. Only the legislature has the power and responsibility to alter "the legal rights, duties, and relations of persons . . . outside the Legislative Branch." *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983). Because of this power and responsibility, a legislature like the D.C. City Council cannot properly be characterized as a mere commercial buyer when it is considering legislation to set a specific price for a service to be provided to another branch of the government. Its decision, especially where an issue of Constitutional rights in involved, is never purely commercial. In each legislative enactment, it acts for the people.

The FTC suggests that a broad rule of exclusion from the antitrust laws for legitimate legislative petitioning will provide a loophole for, *e.g.*, insurance industry, (FTC Br. 34-35), or other conspiracies by powerful lobbies that will mask price fixing in the guise of an appeal for public and legislative support. Such appeals, we are warned, will inevitably be followed by coercive action against the

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[24] When it does, it is almost always due to public indignation at perceived waste and fraud. Such has nothing to do with this case.

[25] *See Pennington*, 381 U.S. at 663 (an alleged collusive bidding arrangement to drive low-bid coal suppliers from the spot market for coal purchased by the Tennessee Valley Authority would not be exempt from the antitrust laws).

[26] *See, e.g., United States v. Mobile Materials, Inc.*, 871 F.2d 902 (10th Cir. 1989) (Oklahoma Department of Transportation and Oklahoma Turnpike Authority).

public[27] and the legislature, coercion which will force the legislature to knuckle under to their demands. (FTC Br. 32-34). Based on the non-existence of such incidents of big business coercion by boycott in the legislative context at any time in our nation's history, the horrible is fanciful.

But assume that it is not. What makes the legislature unique among the branches of government is that it has the tools to prevent such coercion. As this Court recognized in *Buckley v. Valeo*, 424 U.S. at 25 (upholding in part and striking in part provisions of the Federal Election Campaign Act), Congress has the power to prevent corruption and the appearance of corruption spawned by real or imagined coercive influence. Because they can legislate to avoid or defeat coercion, legislatures cannot be coerced in the sense implied by the FTC.

If the City Council had been opposed to a fee increase, or if the CJA lawyers had sought an unrealistically high fee level, the City Council could have mounted its own publicity campaign. Media access is easier for it and an attack on the "over reaching" lawyers for the criminally accused might well have been received positively by the public. As Geoffrey Hazard observed, "the legislature is being asked to provide more money for lawyers for muggers." (C.A. App. 325). Or, the City Council could have authorized a new appropriation to expand the Public Defender Service, so that paid government employees took substantially more cases and the City would be less dependent on CJA lawyers. Alternatively, it could have legislated a community service program, directing that members of the D.C. Bar with relevant litigation experience take, say, three assigned indigent criminal cases per year for the existing or no fee. The record supports a finding that even if the strike were viewed as theoretical legislative coercion, there was no court "crisis."

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[27] The strike did not "coerce" the public as, for example, did the boycott, arguably, in *Claiborne* (*see infra*, pp. 30 n.29, 32-33). Coercion of the public is therefore irrelevant to this case.

How could there have been a crisis when so few qualified lawyers were invited to take cases, and when the court had the power it had exercised in 1974 over a two-month period to order lawyers to take CJA cases? (SCTLA Br. 16, n.7). Respondent Perrotta recognized from the beginning that if the Superior Court chose to exercise this power, which it might, it could break the strike (C.A. App. 451-52).[28]

If a new and sinister trust tries to abuse a rule which protects direct legislative boycotts, assuming it can overcome the hurdle of showing genuine petitioning, it can be neutralized by a new law rendering its objectionable conduct irrelevant or illegal. As long as that legislation is narrowly tailored to serve a substantial government interest, an interest in preventing a more precisely identified harm than eliminating boycotts merely because they put pressure on legislatures, as long as the restriction is unrelated to the suppression of free expression, and as long as meaningful alternative forms of expression are reasonably available to the potential boycotters, then the legislation could pass muster under the First Amendment. *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (U.S. June 22, 1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

There is nothing radical in concluding that the Sherman Act has recognized limits. The Sherman Act has been held not to reach local, violent conduct that more properly is addressed by state tort law, *Apex Hosiery*, 310 U.S. at 513; state action, *Parker v. Brown*, 317 U.S. 341, 352 (1943); or legislative petitioning, *Noerr*, 365 U.S. at 127. It would be more radical to conclude that the Sherman Act regulates the legislative petitioning in this case.

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[28] Judge Needelman, during testimony related to the D.C. government's ability to operate the criminal justice system through pro bono stated "I can't think of a single employer in the United States who has a better way to break a strike." (Tr. 1460 (Lefstein)).

II. THE STRIKE IS ALSO OUTSIDE THE SCOPE OF THE SHERMAN ACT BECAUSE ITS PURPOSE WAS TO GENERATE PUBLICITY, NOT TO APPLY ECONOMIC PRESSURE.

Even if a legislative boycott which is arguably self-interested and applies economic pressure is reached by the Sherman Act, when the challenged conduct, as here, is primarily *motivated* by a desire to engage in political expression, *Noerr* and *Claiborne* exclude it.

Noerr refused to extend the Sherman Act to concerted conduct designed to secure public support for anticompetitive legislation when such conduct did not involve direct economic pressure on the public. The conspirators' economic self-interest in securing legislation that would lessen competition was irrelevant. *Noerr*, 365 U.S. at 138-40. *Claiborne* recognized that even a boycott involving direct economic pressure on the public to support governmental action cannot be categorically prohibited under broad state economic regulation. *Claiborne*, 458 U.S. at 914. If the ultimate goal of the boycotters in securing governmental action is not lessening competition in the boycotted market, then *Claiborne* places such conduct beyond economic regulation. *Id.*; *see also Allied Tube*, 108 S. Ct. at 1941 (discussing *Claiborne*). *Claiborne* left open the possibility that conduct, the main purpose of which is exerting "economic pressure," could be prohibited when the ultimate goal is primarily economic self-benefit.

The Court of Appeals erred in classifying the strike as *Claiborne*-type "economic pressure", and engaging in an analysis of the strikers' ultimate goal in seeking the legislation, rather than focusing on the direct objective of the boycott.[29] It ignored the expressive component of

[29] The rule below puts in doubt the *Claiborne* result if the Mississippi Supreme Court had found that the Sherman Act did apply. The conduct there did involve substantial economically self-interested behavior, (Cross Petition 3-6), and did involve significant elements of economic pressure on the public outside of the legislative arena. (458 U.S. at 903-04.) *Claiborne* also demonstrates the inappropriateness of a market power test to determine whether a boycott is political. Had a market power test alone been employed to determine whether the *Claiborne* boycott was an antitrust violation, it might well have been found to have been illegal. Blacks in Claiborne County made up more than three-fourths of the population. *Claiborne*, 393 So.2d at 1294.

To the extent that *Claiborne* protects economically self-interested direct economic pressure, it cannot be distinguished merely because it involves a boycott seeking "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself." 458 U.S. at 914. The record demonstrates that the Individual Respondents in this case sought to effectuate the Sixth Amendment rights of indigent defendants to effective assistance of counsel, which they and many experts and government officials believed to be threatened by inadequate rates of compensation. (*Supra* pp. 2, 3, 5-7). Whether the Sixth Amendment was in fact being systematically violated is irrelevant. The decision in *Claiborne* did not turn on whether the boycott in that case remedies a proven violation of the Fourteenth Amendment: the fact that the boycott was intended "to effectuate rights guaranteed by the Constitution itself" necessarily implicated political speech and petitioning. *Id.* at 914. The CJA lawyers, the experts, and government officials *believed* that Sixth Amendment rights would be undermined if rates of compensation under the CJA were not increased.

the strike aimed at the public (conduct not involving direct economic pressure on the public), and begged the question of whether the CJA lawyers were primarily engaged in *Noerr*-type conduct.

The Court of Appeals, in one possible reading of *Claiborne*, was correct in stating that "the motivation for the SCTLA boycott [is] a crucial factor in determining whether it constituted protected 'political' activity." (Pet. App. 40a-41a). But the proper motive test in a case where a single course of conduct has the potential to serve arguably both as political expression outside the scope of the Sherman Act under *Noerr*, and as economic pressure potentially within the scope of the Act, is a direct inquiry into whether the lawyers were primarily

motivated by a desire to "express" or to "coerce."[36] If the primary *purpose* of engaging in a strike, as opposed to some other course of conduct, was to open the eyes of the media and the public to an unfair and possibly unconstitutional situation, and to stage an event that created a political climate within which Mayor Barry and the D.C. City Council could pass the legislation without fear of losing public support, then it is necessarily "politically motivated" and outside the scope of the antitrust laws.

> The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, *politically motivated* boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself. *Claiborne*, 458 U.S. at 914 (emphasis added).

The primary motive of the CJA lawyers was to influence public opinion through expression, not coercion. Unlike *Claiborne* and *NOW*, where the boycotters economically pressured members of the public to secure public support for their cause, the strike here could not have had any coercive economic effect on members of

[36] This test is a variation on the application of the *Noerr* "sham" exception. The "sham" exception requires a factfinder to determine whether conduct "ostensibly directed toward influencing government action, is a mere sham to cover what is actually nothing more than an attempt" to inflict direct harm on a competitor. 365 U.S. at 144. Here, it has already been determined that the conduct was genuinely intended to secure governmental action; the issue is whether the claim of securing public support is a mere sham to mask the application of direct economic pressure. *See also Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.) (explaining predatory pricing analysis, which may require a factfinder to determine whether pricing that has an anticompetitive effect was motivated by a legitimate desire to compete, or by an illegal desire to monopolize), *cert. denied*, 434 U.S. 879 (1977). *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 635-36 (1984) (O'Connor, J., concurring).

the public because the lawyers and the public were not in direct contact, and were not in the same economic "market place." The only component of the strike that could possibly have affected the public's position on the legislation was the expressive component. Because the boycott did not involve economic pressure as to the public, and was part of a genuine effort to secure legislation, it is the very activity protected in *Noerr*.

The record shows that the strike was a means, and the only effective means, of expressing the shared view of the CJA lawyers that the criminal justice system was unfair, that denying them a raise was unfair and that the situation had become so serious that a dramatic expression of protest was required to stimulate public awareness. The Court of Appeals acknowledged this when it found, in a separate analysis, that the "factual context" of the strike "suggests that the participants *intended* to communicate a message", and to "publicize the [lawyers'] claim that the prevailing CJA rates were inadequate." (Pet. App. 47a (emphasis added)).

The Individual Respondents were fully aware that individual CJA lawyers threatening to strike in isolation would not have been listened to attentively any more than if they had only been permitted to employ the "normal" forms of speech, less dramatic than a strike. They were told by an expert, Dean Branton, that something along the lines of a strike was their only chance to get the attention of the public and the legislators. (*Supra* p. 9). This advice was underscored by the Mayor's "knowing wink". (*Id.*) The Chief Judge said he would not speak out to the public on their behalf—even though he privately supported them. (*Supra* p. 8). Neither would the City Council or the Mayor without the reassurance of sympathetic public opinion. (*Supra* pp. 8-11) Without dramatic collective action, they had virtually no chance to appeal to the public. The media would not carry their message because it was not news and individ-

ual messages would have been too fragmented. The soundness of this judgment is demonstrated by a comparison of the number of stories carried by the *Washington Post* about the SCTLA legislative efforts during the 7½ *months* before the strike was announced—one (June 13, 1983, p. B2)—and the more than 19 stories carried during the 6 *weeks* after the strike's announcement (*supra* p. 4 n.5).[31]

The record shows the CJA lawyers intended the strike to accomplish two related objectives: (1) to communicate their position to the public; and (2) to create an event that the City Council could, assuming that public support warranted, declare an "emergency" within the meaning of D.C. Code Ann. § 1-229, and thereby invoke the emergency legislative powers to increase the CJA rates. Neither objective was, or was intended to be,

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[31] To condemn respondents' conduct under the antitrust laws would be particularly inappropriate here because the record demonstrates that respondents had exhausted all their alternatives and had no other viable means available to get their message to the public. (*Supra* p. 9). The media and the public are generally uninterested in the plight of criminal defendants—a politically disenfranchised group with "virtually no resources to mobilize in their own behalf with any effective means at all." (C.A. App. 282). When speaking out for the rights of this disenfranchised and extremely unpopular group, the CJA lawyers suffered a form of guilt by association and were similarly ignored. (C.A. App. 325; Pet. App. 191a). The dramatic effect of a boycott is its ability to overcome such entrenched public apathy, which explains why it has traditionally been a tool of the disenfranchised and economically powerless. (C.A. App. 272, 279, 286, 415-16). Under the FTC's reasoning, respondents would be denied the only effective means for engaging the public.

Legislative boycotts should be considered outside the scope of the antitrust laws as long as the boycott is reasonably calculated to secure the particular legislative relief being sought. Yet surely, at a minimum, the Sherman Act cannot proscribe this sole remaining avenue of effective political expression because, in theory, less effective avenues of communication remain open. *Meyer v. Grant*, 108 S. Ct. 1886, 1893 (1988).

coercive. (C.A. App. 451-52). The CJA Lawyers announced their plans several weeks in advance of the effective date to encourage media attention well before the strike began, to allow, among other things, for orderly processing of indigent defendants after the strike, and to minimize the possibility of a "real" crisis, as opposed to a politically convenient "emergency".[32]

Like the publicity campaign in *Noerr*, the activity in issue here "[took] place in the open political arena . . . ." *Allied Tube*, 108 S.Ct. at 1940. The evidentiary record is clear that the strike was a "publicity campaign directed at the general public, seeking legislation." *Id.* at 1936, citing *Noerr*, 365 U.S. at 140-41. The strike was a choreographed dance, political theatre, not economic coercion.

It is unnecessary and irrelevant to inquire into whether the strikers were more self-interested than public-interested or whether they ultimately "coerced" or persuaded the City Council to raise the fees. Where, as here, the political boycott was intended to appeal to the public only through expression, it is "political activity" outside the scope of the antitrust laws.[33]

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[32] Respondent Koskoff went so far as to agree to represent an existing client *pro bono* during the strike. (C.A. App. 822-23).

[33] The fact that this politically motivated strike may have resulted in some direct pressure on the City Council and the Mayor is of no consequence:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed.

Noerr, 365 U.S. at 143; *see also Allied Tube*, 108 S. Ct. at 1936 ("[W]here, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action.").

Let us assume, arguendo, that reaffirmation in this case that the Act does not proscribe petitioning boycotts directed to legislatures will, as the FTC fears, invite several pseudo-petitioning boycotts in the future which threaten both the public and the political process. If the antitrust laws today are not adequate to deal with this development, is it not then for the legislature, rather than the courts, to correct the problem by antitrust or other legislation? Although it has proven a constructive, durable and dynamic statute over the past 100 years, the Sherman Act has not been the last word on needed antitrust laws.

> Courts that refuse to make basic policy choices for the legislature thereby force the legislature to face and decide questions they had previously been content to leave unanswered. In this way the courts help focus the issues to be addressed and make the legislative process more responsible. R. Bork, *The Antitrust Paradox* 83 (1978).

If the CJA strike, or the variety of other legislative boycotts which have been an important part of our political heritage and which continue to be an integral part of our political life,[34] are to be subjected to the antitrust laws, if such a profound and radical political step is to be taken for the first time, it should be by a legislature, not the courts.[35]

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[34] These boycotts are important for the less advantaged especially as here and in *Claiborne*, where they seek to vindicate important Constitutional rights, and where the boycott provides the only means for obtaining legislative relief that has any chance to work. (Pet. App. 187a-189a).

[35] This Court has even limited the Sherman Act when doing so was illogical, but reflected proper deference to Congress. *See Flood v. Kuhn*, 407 U.S. 258, 284 (1972) ("If there is any inconsistency or illogic in all of this, [exempting professional baseball from the antitrust laws] it is an inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court.").

III. IF THE SHERMAN ACT APPLIES, THE STRIKE MUST NOT BE AN ANTITRUST VIOLATION UNDER A RULE OF REASON STANDARD BECAUSE IT WAS NOT, ON BALANCE, ANTICOMPETITIVE IN PURPOSE OR EFFECT.

The FTC attempts to hide behind the *per se* rule because, in this case, it cannot prove that the Individual Respondents engaged in the strike with an intent to reduce competition, or that their strike had an anticompetitive effect. The *per se* rule should be applied only to practices that "always or almost always tend to restrict competition and decrease output." [36] A temporary strike, in the context of this case, is not such a practice.

The FTC has not identified the competition that the strike eliminated. There was no possibility of price competition among the CJA lawyers, because the fees were fixed by the legislature. In such circumstances, the only parameters of competition are quality and availability of supply. The legislatively determined fee was inadequate to permit quality competition. Rather, it drove the CJA lawyers to take too many cases and to cut operating costs and efforts expended. (Pet. App. 175a-177a). The hourly fee ceiling not only inhibited quality competition, it perversely affected the incentive structure to drive down the overall quality of CJA representation, and made CJA work unattractive to many quality and otherwise interested lawyers. (Pet. App. 176a). In focusing on the striker's goal of increasing the hourly fee for work per-

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[36] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979), *quoted in Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, ——, 108 S.Ct. 1515, 1519 (1988). As this court stated in *NCAA v. Board of Regents*, "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or of actual market analysis, the essential inquiry remains the same —whether or not the challenged restraint enhances competition." 468 U.S. 85, 103-04 (1984) (footnotes omitted).

formed, the FTC ignores the fact the Individual Respondents neither sought nor received as a provision of the legislation [37] an increase in the ceiling imposed on the annual CJA fees that could be earned by any one attorney. (C.A. App. 573). Many of the Respondents did not expect to work less or earn more as a result of the hourly fee increase. Rather, as Respondent Koskoff noted, they simply expected to be able to spend more time on fewer cases, providing better service, for what they had earned before. (C.A. App. 237). Thus, there was no competition in any relevant sense to be restricted by the strike.

One main goal of the strike for the Individual Respondents was to *increase* the number of qualified attorneys volunteering to take CJA cases. (*Supra* p. 5). This purpose was effected dramatically, by an approximate doubling of the number of attorneys daily seeking CJA appointments after the strike was settled. A related goal was to increase the quality of legal services provided to indigent clients. (C.A. App. 156-61). Expert testimony stated that this would be the result of raising the hourly fee level. (C.A. App. 325-26; Tr. 1539-40 (Lefstein)). The FTC offered no contrary evidence. (C.A. App. 140, 143, 161, 201-02).

The FTC asserts that the District's payment of higher fees is an anticompetitive effect of the strike.[38] But the FTC ignores the obvious fact that the District thereafter received an entirely different and higher level of CJA services under the new fee structure. Subsequently, the District enjoyed a much larger pool of qualified attorneys providing higher quality legal service. This Court recognized in *National Society of Professional Engineers v.*

[37] Subsequent to the passage of the legislation, the Joint Counsel on Judicial Administration raised the ceiling from $42,000 to $50,000, although no request to do so was made by the CJA lawyers.

[38] Judge Needleman disagreed, concluding that "in the context of the special circumstances of this case, it cannot be presumed that the higher costs attributed to the 1983 boycott are adverse effects." (Pet. App. 228a-229a).

United States, 435 U.S. 679 (1978), that a "temporary and limited loss of competition" can serve to benefit *long-run* competition—and is therefore legal under rule of reason—where it "provid[es] incentives to develop [the] enterprise. . . . ." *Id.* at 689 (citing *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711)). That is exactly what happened here. By raising the CJA hourly fees, the District increased the supply of CJA attorneys and created a better opportunity for quality competition to occur, enhancing overall competition in the long run.

The absence of anticompetitive effects is not surprising here for three reasons. First, the absence of entry barriers made it impossible for such effects to develop. Typically, a price fixing conspiracy is designed to raise prices received by a limited group of suppliers who have the ability to prevent new entry from competing away the profitability of the price increase.[39] Here, however, the Individual Respondents wished to attract new entry, and the record shows that they were admirably successful in so doing.

Second, the ultimate effect—a higher hourly rate—was the result of legislation enacted by the City Council. As this court said in *Noerr*, 365 U.S. at 137 n.17 (citing *Parker v. Brown* 317 U.S. 341 (1943)), once passed, legislation is exempted state action. If the higher rate is the anticompetitive effect, it is caused by the intervening act of the legislature, not by the strikers. *Accord Kaiser Cement Corp. v. Fischbach and Moore, Inc.*, 793 F.2d 1100 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986) (no injury where arbitration award had been based on amount arbitrators thought a fair contract price regard-

[39] If entry barriers are low, the market power necessary to sustain collusion is unlikely to persist. *Statement of Federal Trade Commission concerning Horizontal Mergers*, 4 Trade Reg. Rep. (CCH) ¶ 13,200 (1982). *See also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986).

less of alleged bid-rigging); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (intervening state action rendered non-justiciable alleged antitrust conspiracy to induce plaintiff to engage in conduct causing its nationalization).

Third, the Individual Respondents did not intend to restrain competition and it seems odd indeed to assume, as the application of a *per se* rule would, that such was their motive. Usually, those with anticompetitive intentions do not actively seek publicity and media coverage of their "conspiracy." Nor do they announce their plans well ahead of the effective date, in order to permit the intended victim to take steps to minimize, if not eliminate, the potential harmful effects of a conspiracy. It is also strange for the conspiracy to have, as an important objective, the immediate increase of supply. Finally, it is most unusual for conspirators with an economic stake in the success of the conspiratorial efforts not even to seek a higher ceiling for permitted yearly earnings.

The coexistence of these facts makes the inference of anticompetitive purpose "implausible." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986). Any minimal restrictive effect of a joint program to withhold labor is, in the context of this case, ancillary to the main purpose of increasing the quantity and quality of lawyering.[40]

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[40] The FTC's reliance on *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), is misguided. The CJA lawyers do not argue that the harm caused by unrestricted competition outweighs its presumed benefits, (although such might be the very case in which the Constitutional concerns for free speech and adequate legal representation for criminal defendants could combine to outweigh the economic benefit of competition, if this boycott had had the goal of restricting competition). The CJA lawyers were not concerned with a social harm caused by competition, but with the *lack* of effective competition resulting from the legislature's setting an unreasonably low rate. This Court distinguished the canon of ethics in *Professional Engineers* from the restriction in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918) on the basis that the latter had "a positive effect on competition." *Professional Engineers*, 435 U.S. at 693 n.19 (1978). That was the intended and actual effect of the CJA lawyers strike.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed and this case should be dismissed.

Respectfully submitted.

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REPLY

BRIEF

AUG 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1198 and 88-1393

In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

The only conduct challenged by the Commission in this case was a concerted refusal by competing private practice attorneys to provide their professional services to the District of Columbia "unless we are granted a substantial increase in our hourly rate" (Pet. App. 78a). As a result of this conduct, the District of Columbia was denied the services of nearly every attorney who had theretofore chosen to make a practice of accepting CJA assignments. Only when it increased the CJA rate was the District again able to retain the services of the boycotting lawyers.

In the court of appeals' words, "[t]his constriction of supply is the essence of 'price-fixing' " (Pet. App. 16a) and "could properly be condemned as a *per se* violation of Section 1 of the Sherman Act unless it also comes within the protection of the First Amendment" (*id.* at 32a). Respondents and their amici[1] have failed to identify any existing principle of Sherman Act construction or First Amendment law that would warrant either absolute immunity, or exemption from *per se* condemnation, for the price-fixing boycott in which they engaged.

1.a. The court of appeals (Pet. App. 45a), the Commission (*id.* at 123a), and the administrative law judge (*id.* at 216a), all recognized that to grant antitrust immunity to respondents' boycott would entail an extraordinary expansion of the *Noerr* doctrine. As our opening brief demonstrated, the *Noerr* doctrine does not protect "price-fixing agreements, boycotts, market-division agreements, and other similar arrangements" even if they are an integral part of a campaign to exert pressure on a legislature (*Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-37 (1961)). *Noerr* assures only that the Sherman Act's prohibition against "conspirac[ies] * * * in restraint of trade" (15 U.S.C. 1) cannot be construed to prohibit agreements by businessmen "jointly to seek legislation or law enforcement" (365 U.S. at 136) through the same "otherwise lawful" (*id.* at 138) means of publicity and persuasion that all citizens have at their disposal.[2]

[1] Respondent Superior Court Trial Lawyers Association (SCTLA) and the individual respondents (Ind.) have filed separate briefs. *Amicus* briefs supporting respondents have been filed by: the Washington Council of Lawyers et al. (WCL); the American Medical Association (AMA); the American Civil Liberties Union (ACLU); and the National Association of Criminal Defense Lawyers (NACDL).

[2] Amicus WCL ignores this point when it argues (Br. 8) that to deny the possibility of *Noerr* immunity for price-fixing and other classic trade restraints would deprive *Noerr* of content because *Noerr* comes into play only when conduct that would "otherwise violate the antitrust laws" is involved. In fact, traditional joint lobbying and publicity campaigns to achieve anticompetitive legislation could easily have been held to "violate the antitrust laws" but for *Noerr's* rejection of such an "expansive" construction of the Sherman Act (365 U.S. at 136).

Allied Tube & Conduit Corp. v. *Indian Head, Inc.*, 108 S.Ct. 1931 (1988), confirms that *Noerr* affords no immunity for naked horizontal restraints of trade such as price-fixing and output restrictions. In *Allied Tube,* the Court addressed and rejected an argument similar to one respondents make here: that *Noerr* immunizes "every concerted effort that is genuinely intended to influence government action" (108 S.Ct. at 1938).[3] The Court noted that this "absolutist position" (*ibid.*) would immunize, *e.g.*, "horizontal output restrictions on the ground that they are intended to dramatize the plight of [an] industry and spur legislative action" (*id.* at 1939). Instead, this Court held that the legality of genuine efforts to influence legislation must depend on the "context and nature of the activity" (*ibid.*). The Court's reference to "context and nature" was plainly not designed, as SCTLA and WCL contend (SCTLA Br. 24; WCL Br. 8-9), to raise the novel possibility that price-fixing and horizontal output restrictions designed to obtain a price increase could be deemed protected conduct under some circumstances. Rather, the Court was explaining that activities of this "nature" are not immune under *Noerr* even though they may be "genuinely" intended to "spur legislative action" (108 S. Ct. at 1939).[4]

In an effort to bring themselves within *Noerr*'s ambit, petitioners insist that a principal purpose of their concerted refusal to deal was to influence the legislature by eliciting publicity and public support for their position (*e.g.*, Ind. Br. 34-35; SCTLA Br. 25). This argument in unavailing because, as the Court in *Noerr* emphasized, the publicity campaign there involved no agreement by the participants to "jointly give up their trade freedom" (365 U.S. at 136). The only "contract, combination

[3] Compare, *e.g.*: "genuine efforts to petition the legislature are not within the scope of the Sherman Act" (SCTLA Br. 23); "a legislative boycott aimed directly at petitioning the legislature is by that fact alone beyond the Sherman Act" (Ind. Br. 14).

[4] This is further apparent from the majority's criticism of the dissent (108 S. Ct. at 1941 n.10) for not offering an alternative to distinguish those "nonimmune activities [output restrictions and others] from the activity at issue in this case."

* * * or conspiracy" in *Noerr* was the joint conduct of the parties in placing advertisements designed to influence public and legislative opinion in their favor. Here, by contrast, respondents collectively withheld their services from a buyer until it agreed to pay a higher price for them. This was an "agreement[] traditionally condemned by § 1 of the [Sherman] Act" (365 U.S. at 136).[5] Whether and to what extent this classic trade restraint was intended to, or actually did, elicit publicity or public support for respondents' cause is simply irrelevant.

It likewise makes no difference to the legality of respondents' boycott that, in their view, the boycott was "the only effective means" (Ind. Br. 33) or "require[d] * * * to mobilize the political support necessary for [] passage" of a fee increase (SCTLA Br. 24; see also AMA Br. 14; ACLU Br. 10). Nothing in *Noerr* suggests that the right to petition the government includes the right to use whatever techniques one feels necessary to petition successfully (Pet. App. 123a).[6] Surely no one would suggest that a political group or advocacy organization might, by leave of the First Amendment, block entry to the offices of D.C. councilmembers, spray-paint pleas for more money on

[5] Although the trucker-plaintiffs in *Noerr* contended that the railroads' use of the so-called "third party technique" ("giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups" (365 U.S. at 140)) was unethical, the Court noted that "insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity and * * * a publicity campaign to influence governmental action falls clearly into the category of political activity." The Court also emphasized the lower court's apparent rejection of the proposition "that the use of the third-party technique alone could constitute a violation of the Sherman Act." (365 U.S. at 140-141.)

[6] Respondents cannot claim that they had no significant means available to them other than a boycott by which to express their views. The record shows that prior to the boycott they collectively met with numerous City officials and influential members of the public, and secured introduction of legislation to effect the changes they desired (Pet. App. 6a-7a). Plainly, they enjoyed far greater access to the legislative process than many persons do. Respondents' complaint is simply that the lawful means of communication at their disposal had not resulted, as of September 1983, in passage of the legislation they desired.

the walls of the District Building, or violate traffic or park service regulations because they had grown dissatisfied with the results of lawful lobbying activities and sincerely believed they had "no other viable means available to get their message to the public" (Ind. Br. 34 n.31). Lawyers enjoy no greater right to employ price-fixing as a means of putting pressure on the legislature.

It would not affect the legality of the boycott under *Noerr* if, as SCTLA contends, "the perception of government officials" was "that they [we]re being lobbied rather than coerced" (SCTLA Br. 30).[7] Despite SCTLA's disavowals, this argument is but a restatement of the rejected view that the "knowing wink" of city officials (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-227 (1940)), or a target's ultimate acquiescence in a boycott, makes the boycott legal. By this logic, any boycott, public employee strike, office blockade, graffiti campaign, or other statutorily prohibited act committed in a sincere effort to influence the legislature would become "legitimate political activity" and gain First Amendment protection so long as the target government chose to overlook the unlawfulness of the conduct and address the merits of the legislative demands at issue.

To soften the anarchic implications of their position, respondents insist that "boycotts promoting legislation" have

[7] The Commission, of course, rejected this conclusion. It noted that despite widespread support for increased CJA funding, the City Council, for budgetary reasons, declined to increase the rate until a boycott created the imminent prospect of a court crisis (Pet. App. 96a-97a). We also note that (1) Chief Judge Moultrie, in his own words, was "unalterably opposed to * * * an organized boycott" as a means of raising the CJA rate (Pet. App. 81a & n.47) and (2) neither Mayor Barry nor any member of the D.C. City Council is on record as supporting the SCTLA boycott specifically, or supplier boycotts (or public employee strikes) generally, as a way to prod timorous legislators to act in the public interest "without fear of losing public support" (Ind. Br. 32). Respondents' interpretation of remarks they attribute to the Mayor (SCTLA Br. 12-13, 29) is solely their own. The only public officials who *have* made an appearance in this proceeding have unequivocally opposed SCTLA's contention that joint supplier refusals to deal are a lawful means of persuading a legislature to increase prices. See Brief of 14 States as Amici Curiae in Support of Petitioner (June 22, 1989).

"been a part of the legitimate political heritage of our nation since its foundation" (Ind. Br. 23; see also WCL Br. 9) and are thus either constitutionally protected, or were never meant to be covered by the Sherman Act at all (Ind. Br. 20-24). But the "boycott" in this case, unlike the various consumer boycotts and tax protests cited by Individual Respondents (Br. 20-24) was "the essence of price-fixing": an agreement by economic competitors to withhold supply in order "to profit financially from a lessening of competition in the boycotted market" (*Allied Tube*, 108 S. Ct. at 1941). Respondents offer no evidence that this kind of conduct enjoys an honored place in the history of political protest. To the contrary, "the Congress that enacted the Sherman Act intended to make naked price-fixing agreements illegal per se" (R. Bork, *The Antitrust Paradox* 66 (1978)), and as the court of appeals demonstrated (Pet. App. 16a-32a), the conduct in this case is a "classic" example of the conduct covered by the language of the Sherman Act.[8]

It may well be true, as respondents maintain, that the years before passage of the Sherman Act in 1890 saw few if any instances of public price-fixing boycotts directed at legislatures

[8] As noted in our opening brief (FTC Br. 10 n.11), the price-fixing here took the form of a "boycott" only because, in the market for indigent legal services, like many others, the buyer (rather than the seller) posts a price, sellers decide whether to supply at that price, and the buyer adjusts the price if the free play of competition (or, as here, a seller's cartel) does not yield an adequate supply (see also Pet. App. 86a).

SCTLA's suggestion that "caution in applying the antitrust laws" is warranted because the boycott was "open and notorious" (SCTLA Br. 28) is plainly wrong. Price-fixing often occurs in the open because the participants are insensitive to the legal significance of their conduct. See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783 (1974) (published bar association fee schedule is "a classic illustration of price-fixing"); *San Juan Racing Ass'n* v. *Asociacion de Jinetes*, 590 F.2d 31, 32 (1st Cir. 1979) ("openness does not immunize agreement"); Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 Cornell L. Rev. 405, 417 (1978) (civil, rather than criminal suit may be warranted because "[o]ccasionally defendants engage in per se price-fixing, but their conduct clearly indicates that they had no idea they were violating the antitrust laws. There may, for instance, have been open and widely advertised public meetings among a group of naive businessmen without an antitrust counsel").

(Ind. Br. 21 & n.16). But that sheds no light upon the intended reach of the Sherman Act. Governments in the 19th century did not spend millions of dollars to purchase the services of private-practice lawyers, doctors, and other businesspersons. Today, by contrast, government purchases account for more than a fifth of the gross national product – over $900 billion (United States Bureau of the Census, *Statistical Abstract of the United States: 1989*, at 421 (109th ed. 1988)). "Congress intended to strike as broadly as it could in § 1 of the Sherman Act" (*Goldfarb* v. *Virginia State Bar*, 421 U.S. at 787). The Act's reach cannot be limited even if, in the "modern world" (*id.* at 788), the targets and perpetrators of price-fixing are not always the same as they were before 1890.

Similarly unavailing is the contention that the SCTLA boycott deserves *Noerr* immunity because the legislature can always "legislate to • • • defeat coercion" (Ind. Br. 28) and thus "do[es] not need protection against economic pressures" (ACLU Br. 6; see also SCTLA Br. 28). Congress has already legislated – in the Sherman Act – to protect all buyers, including legislatures, from collusive refusals to deal by those who supply needed goods and services.[9] If the Constitution forbids application of the Sherman Act to public price-fixing boycotts against the legislature on grounds that such economic behavior is protected political communication, the First Amendment would presumably invalidate whatever other statute a legislature might fashion to protect itself from such conduct.

Respondents also appear to mean by their "protect itself" defense that the D.C. City Council might have taken steps to reduce its demand for the CJA lawyers' services, *e.g.*, by proposing "a large increase in the PDS appropriations" (SCTLA Br. 28-29 n.16) or legislating a new "community service program" involving compulsory representation of indigents by

[9] The *Noerr* doctrine, of course, is not limited to efforts to petition the legislature. See *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). Likewise, respondents' "protect itself" argument would apply to any publicly conducted price-fixing against an executive branch agency, since presumably the legislature could "protect" the executive in the same ways that respondents suggest it should be able to protect itself.

selected members of the bar (Ind. Br. 28). Respondents' argument is akin to contending that a bakers' boycott is legal because the populace could survive or even defeat the boycott by eating rice or baking their own bread. The alternatives available to the City to break the SCTLA boycott carried with them high costs and significant drawbacks (Pet. App. 158a-161a, 205a-206a). The City chose to pay the $4-5 million annual cost of a CJA rate increase rather than the cost in dollars of enlarging the Public Defender Service or the cost in civic turmoil of a massive lawyers' draft.[10] This hardly demonstrates that the City was not entitled, like any buyer, to antitrust protection from the boycott in the first place, or that the boycott was immune under *Noerr*.

b. Respondents fare no better in their effort to bring themselves within the scope of *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). Although a higher CJA rate was the explicit object of their boycott, the individual respondents attempt to demonstrate that, at least for some of them, earning more money was of secondary concern to their desire to improve the quality of CJA representation. But nothing in respondents' briefs provides reason to doubt the conclusion, reached by both the Commission and court of appeals after

[10] SCTLA claims that the 1974 draft (imposed during a lapse in CJA appropriations) proves that a draft would have succeeded in 1983 (*e.g.*, Br. 48-49 n.36). But Chief Judge Moultrie drew a different conclusion. Because of "strenuous" resistance to the 1974 draft ("[o]nly 43% of the attorneys summoned actually reported" (Pet. App. 159a) and the D.C. Bar filed a court challenge (Tr. 1078)), Judge Moultrie, long before the 1983 boycott "had indicated an unwillingness to impose similar drafts" (Pet. App. 160a; see also Pet. App. 52a). Moreover, even a "successful" draft, in which several hundred "uptown" lawyers each handled a few cases, would not have provided the same level of representation as the CJA program. SCTLA's own witness acknowledged that a lawyer "cannot maintain awareness and proficiency in regard to such matters [criminal defense work] unless you are continuously involved in them" (Tr. 1143-1144 (Hazard); see also Tr. 244-245, 272-273 (Carter)).

careful consideration, that "the boycott was motivated primarily by economic self-interest" (Pet. App. 43a).[11]

Although the CJA lawyers' manifest economic interest in their boycott makes this case an easy one, subjective motivation should not ever be the test. It is "well settled that good motives will not validate an otherwise anticompetitive practice" (*NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984) (citing cases)). When competing suppliers "jointly give up their trade freedom" by collectively withholding their services from a buyer—whether it be the legislature or any other—they engage in economic behavior. Society may regulate or prohibit such economic behavior, even if it is used in an effort to communicate or to influence the political process, and regardless of the ratio of avarice to idealism that motivates it. See *International Longshoremen's Assoc.* v. *Allied International, Inc.*, 456 U.S. 212, 225-226 (1982) (politically motivated secondary boycotters with *no* economic interest denied First Amendment protection).[12]

[11] Respondents' selective and in some cases misleading recasting of the evidence provides no basis on which this Court could reverse this finding, even were it to accept respondents' request to review it *de novo* (Ind. Br. 19 n.12). To cite but one example, respondents claim "many" of them "did not expect to * * * earn more as a result of the hourly fee increase" because the boycott did not demand an increase in the yearly maximum cap on CJA earnings (Ind. Br. 38). Respondents fail to disclose that the pre-strike cap on CJA earnings was well above the pre-boycott earnings of most CJA lawyers. Thus, only the hourly CJA rate (the sole focus of the boycott) determined how much most CJA lawyers earned; the yearly cap was not a constraint. Moreover, the yearly cap was set administratively, not by legislation. Shortly after the City Council raised the hourly CJA rate, the yearly cap was also increased (to $50,000). (See Pet. App. 170a.)

[12] Respondents observe that the First Circuit's decision in the *Longshoremen's* case dismissed an antitrust count (Ind. Br. 23-24 n. 21; SCTLA Br. 40 n.30). That does not aid respondents because the court's holding rested on its finding that the longshoremen's boycott was "ill-designed as a means of gaining a competitive or commercial advantage for the union or its members" (*Allied International, Inc.* v. *International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 (1st Cir. 1981)). Moreover, the holding was "fortified" by the fact that the boycott violated provisions of the Labor Management Relations Act that were " 'enacted as an alternative to subjecting unions

2. Just as respondents have shown no basis for absolute antitrust immunity for their conduct, so, too, have they failed to show any reason why their conduct should escape the summary condemnation (without regard to market power) that the Sherman Act prescribes for naked horizontal restraints on price and output.

Respondents do not question seriously the court of appeals' conclusion that theirs was a "naked" horizontal restraint. As the court found, "petitioners have advanced no claim that their boycott was ancillary and necessary to some larger, cooperative venture that permitted them to operate more efficiently" (Pet. App. 21a-22a). As the court of appeals further noted after reviewing this Court's decisions, the economic wisdom of the *per se* prohibition of horizontal restraints on price or output has been reexamined only "in the context of horizontal restraints that were 'ancillary' to 'an integration of the economic activities of the parties and appear[ed] capable of enhancing the group's efficiency' " (Pet. App. 21a, quoting *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986)).[13]

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to antitrust liability for secondary activities' " (*id.* at 1381). Given the common purpose of anti-trust and anti-strike laws, there is no logical reason whatsoever why the First Amendment should be applied differently to them.

[13] In some cases in which this Court has examined proffered procompetitive justifications for naked horizontal restraints, it has described its analysis as involving the "rule of reason." But the "rule of reason" analysis performed in these cases considers only the alleged justifications; if they are found meritless, condemnation of the practice follows without proof of market power. See, *e.g.*, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 110. The AMA tries to exploit this variance in terminology by arguing that in *Michigan State Medical Society*, 101 F.T.C. 191 (1983), "the Commission saw fit to apply the rule of reason" (AMA Br. 24). This statement is true, but misleading in the present context. *Michigan State* involved a threatened Medicaid boycott. The Commission's "rule of reason" analysis entailed examination of "asserted pro-competitive justifications" for the threatened boycott (101 F.T.C. at 291). Upon rejecting these, the Commission held the conduct unlawful without any market power inquiry (*id.* at 289-296).

Respondents suggest that their boycott was pro-competitive because the higher price they achieved resulted in "an entirely different and higher level of CJA services" and "a much larger pool of qualified attorneys providing higher quality legal service" (Ind. Br. 38). It would not be surprising if a 75% increase in the price of a service attracted new providers and increased quality.[14] But this Court has rejected such a "justification" for price-fixing as a "frontal assault on the basic policy of the Sherman Act" (*National Society of Professional Engineers* v. *United States*, 435 U.S. at 695).[15]

The contention of respondents and the court of appeals that application of the *per se* rule to this case is impermissible under *United States* v. *O'Brien*, 391 U.S. 367 (1968), has been undermined further, rather than assisted as SCTLA maintains (Br. 45), by this Court's recent First Amendment decisions. As this Court has made clear, the *O'Brien* test for evaluating regulation of allegedly expressive conduct is a "relatively lenient" one (*Texas* v. *Johnson*, 109 S.Ct. 2533, 2540 (1989)). It requires not that a regulation be the "least restrictive" or "least intrusive" means of accomplishing an end, but only that it reflect "narrow tailoring" to achieve the government's purpose (*Ward* v. *Rock Against Racism*, 109 S.Ct. 2746, 2757-2758 (1989)). And the "requirement of narrow tailoring is satisfied 'so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' " (109 S.Ct. at 2758, quoting *United States* v. *Albertini*, 472 U.S. 677, 689 (1985); see also *Board of Trustees, State Univ. of N.Y.* v. *Fox*, 109 S.Ct. 3028, 3033-3034 (1989).

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[14] For a more balanced assessment of the actual impact of the increased CJA fee than respondents provide, however, see Pet. App. 207a-208a ("a dramatic transformation in the quality of indigency practice is unlikely").

[15] Equally misplaced is the AMA's suggestion that price-fixing boycotts against the government may be pro-competitive because they alert the government that it is spending too little on the good or service subject to the boycott (AMA Br. 18-19). The AMA has it backwards. Our economic system relies on the results of competition, not collusion, to let buyers know whether they are offering enough for a particular good or service (*e.g.*, *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 104 n.27).

As we observed in our opening brief, the Sherman Act, as construed by this Court in *Noerr* and *Claiborne Hardware*, has already been tailored to accommodate the speech rights of competitors with the antitrust rights of the public (FTC Br. 26).[16] The further "tailoring" demanded by respondents can only be achieved at a very great cost to statutory clarity and effective law enforcement.

Respondents suggest essentially three reasons why the *per se* rule is unconstitutionally overbroad. First, in their view, "legislative petitioning boycotts" as a class are unlikely to present the same threat to competition as other price-fixing boycotts do. This is so, respondents claim, because, "the predominant effects upon consumers flow from governmental action and are likely to be quite different from those usually associated with a cartel" (SCTLA Br. 33; see also Ind. Br. 39), and because "petitioning boycotts" must depend for their success on "persuasion" rather than "coercion," so that presumptions about the exercise of market power that underlie the *per se* rule do not apply (*e.g.*, SCTLA Br. 35). This logic is flawed.

The "predominant effects" of a "petitioning" price-fixing boycott, like the effects of any other price-fixing boycott, flow from collusive *private* action: a purchaser is denied the freedom to obtain goods or services in a competitive market unless it pays more for them.[17] Whether (and to what unquantifiable degree) such concerted disruptions of supply "coerce" or "persuade" the legislature to act, there is no reason to assume that, as a class, they pose a lesser economic threat than any others.[18]

Respondents' second contention is simply that as applied to *this case*, the *per se* rule is overbroad because the conduct here is not harmful. This begs the question (and is also incorrect as we discuss elsewhere). The point of *United States* v. *Albertini*, *supra*, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984), and *O'Brien* itself, is that content-neutral prohibitions of generally harmful conduct can be upheld against the "limitless variety" (391 U.S. at 376) of potential "expressive conduct" claims, without demonstration in each particular case that the proscribed conduct causes the underlying harm that the legislature sought to prevent.[19]

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[16] WCL's observation that "*Claiborne Hardware* is the application in one particular context of the general rule set forth in *O'Brien*" (WCL Br. 23) makes our point precisely. As we showed in our opening brief (at 17-24), this Court has repeatedly made clear that the "political boycott" doctrine announced in *Claiborne Hardware* does not apply to price-related competitor boycotts. In announcing that *O'Brien* does apply to this case, the court of appeals disregarded the manner in which this Court has already applied *O'Brien* to the antitrust laws.

[17] The purchaser (and victim) need not be a legislature. Respondents' definition of a "petitioning boycott" includes any concerted refusal to deal designed to influence legislative action, whether the purchaser is the government, as here, or individual consumers, as in a concerted gasoline station shutdown undertaken to induce relaxation of legislative price controls.

[18] Respondents' contention that the legislature can "protect itself" provides no basis for distinction in this context. As we noted earlier (pp. 7-8, *supra*) legislatures must ordinarily pay a price – in money or civic turmoil – if they seek to break a boycott. State and local governments are thus no less presumptively immune to the exercise of market power than resourceful private parties. Respondents also suggest that expressive price-fixing is less worrisome than other price-fixing because it is "a traditional tool of the disenfranchised" (SCTLA Br. 44) and "picturesque 'little people' in the Jeffersonian tradition" (*id.* at 41). In the Commission's experience, however, such boycotts are more often engineered by some of society's most privileged members – lawyers, doctors, and other professional elites. *E.g.*, *Michigan State Medical Society*, *supra*; FTC Br. 33 n. 28. Although SCTLA disputes our belief that price-fixing boycotts against the government are infrequent because most people consider them unlawful (Br. 41), amicus AMA confirms our view. The AMA cautions its members (presumably reflecting its understanding of what the law requires) "to avoid activities that could be characterized as a collective refusal to deal with governmental or private payors" (AMA Br. 24 n.17).

[19] *Clark* illustrates the point notwithstanding WCL's claim (Br. 27-28) that it involved some "proven danger" not present here. In *Clark*, the Park Service had permitted homeless persons to conduct a 24-hour vigil in Lafayette Park. The protestors argued it would do no incremental harm to the Park were they to violate a regulation against "overnight sleeping" during the permitted vigil. Without refuting that plausible premise, this Court held that "the validity of this regulation need not be judged solely by reference to the demonstration at hand" (468 U.S. at 296-297).

Respondents and amici inaptly seek refuge from *Clark* and *Albertini* in this Court's observation that "[a] complete ban can be narrowly tailored * * * only

Finally, respondents suggest that the *per se* rule should be deemed unconstitutional as applied to the present boycott by approximately 100 CJA lawyers (comprising nearly all those who made a practice of CJA cases at the time) because otherwise the law would prohibit totally inconsequential boycotts by only "two" (SCTLA Br. 38) or "five" (WCL Br. 14) lawyers out of 100, and "no matter how brief in duration their boycott is" (SCTLA Br. 46).[20] But many laws have *de minimis* applications that do not make such laws unconstitutional. If two federal employees went on strike for one day to express their view on an issue of public importance, they would be violating the *per se* federal employee anti-strike law (see 5 U.S.C. 7311). That hypothetical possibility surely does not call into question application of the law to indefinite strikes by 100 or 1000 or 10,000 employees.[21]

Of course, the *de minimis per se* price-fixing boycotts imagined by respondents, like *de minimis* strikes, seldom if ever occur, because two or five lawyers acting alone in a market served by 100 lawyers would have no reason to believe that a concerted

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of each activity within the proscription's scope is an appropriately targeted evil" (*Frisby* v. *Schultz*, 108 S.Ct. 2495, 2502-2503 (1988); see, *e.g.*, SCTLA Br. 45). The Court has construed this statement to mean only that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals" (*Ward* v. *Rock Against Racism*, 109 S.Ct. at 2758). The *per se* rule against price-fixing, like *per se* laws against strikes, speeding, and sleeping overnight in the parks, satisfies that standard even though not every single instance of the conduct prohibited by such laws necessarily causes the substantive harm at which the categorical prohibitions are directed.

[20] In fact, respondents' boycott was neither "limited in duration" (SCTLA Br. 41) nor a "temporary strike" (Ind. Br. 37). The boycott was designed to last, and did last, for as long as it took the target to agree to increase its price. No price-fixing boycott ever lasts any longer than this.

[21] SCTLA suggests, with no support, that "prosecutorial discretion" is not an adequate answer to *de minimis* applications of the antitrust laws (as it is for all other laws), because the antitrust laws are privately enforced (SCTLA Br. 38 n.27). But an alleged Sherman Act violation may be privately challenged only by a person who is "injured" (15 U.S.C. 15) or can show "threatened loss or damage" (15 U.S.C. 26). Private enforcement in *de minimis* cases is therefore not a concern.

refusal to deal could have any effect. By contrast, the administrative law judge found that "[t]he expectation of the CJA lawyers was that their boycott would have a severe impact on the District's criminal justice system. This expectation was fully realized * * *" (Pet. App. 195a).[22]

The Commission certainly does not maintain that *Albertini* and related cases eliminate any need for the government to distinguish the harmful from the harmless unless it can do so "at no cost whatsoever" (SCTLA Br. 43). Our point is that sacrificing the protections of the *per se* rule in the case of public price-fixing boycotts against the government (or even just the legislature[23]) would impose substantial and potentially debilitating costs upon antitrust enforcement – as well as create substantial uncertainty for those who must obey the law. As this Court has recognized (*Northern Pacific R.R.* v. *United States*, 356 U.S. 1, 5 (1958)), *per se* rules spare courts and litigants

> the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken.

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[22] To overcome this and related findings of the Commission (see FTC Br. 41), respondents now assert that their boycott did not result in a 'real' crisis", but only "a politically convenient 'emergency' " (Ind. Br. 35; see also *id.* at 28-29). They buttress this assertion with the claim that no indigent defendant was denied counsel during the boycott (*id.* at 12; see also SCTLA Br. 14). This last statement, unlike the first, may be true. Denying counsel to an indigent would have required dismissal of the charges against him. When the point came during the boycott at which the Chairman and Director of the PDS represented to the Mayor and City Council that this intolerable result was imminent, owing to the exhaustion of the resources of PDS attorneys and those few CJA regulars who did not join the boycott (see Pet. App. 197a-200a), the City agreed to increase the CJA rate.

[23] Although respondents note that many government purchases are made by executive agencies acting pursuant to nonspecific appropriations (Ind. Br. 26-27), all such appropriations ultimately derive from legislatures. Many overt or covert boycotts now aimed at influencing executive bodies could easily be restructured to assume the form of a demand for legislation if that were made a basis for relaxed antitrust treatment. See also note 17, *supra*.

The magnitude of the costs and uncertainty imposed on antitrust enforcement by the market power requirement respondents advocate is best illustrated by the dizzying array of facts that they themselves apparently consider relevant to determining whether an alleged "petitioning boycott" would be lawful under the Sherman Act (*e.g.*, SCTLA Br. 1-20; Ind. Br. 2-12). The record of this case shows an agreement by competing private practice attorneys to withhold their services from the government unless it increased its price for their services (Pet. App. 8a-9a). The attorneys comprised nearly 100% of those who made a practice of providing the vital service in question (*ibid.*). The attorneys "expected" that their boycott would seriously affect the City (by depriving the court of an adequate supply of attorneys) (*id.* at 195a), and within two weeks of the boycott's commencement precisely that effect had occurred: the head of the Public Defender Service announced that a "crisis" (*i.e.*, an insufficient supply of lawyers to satisfy the constitutional requirement) was imminent (*id.* at 9a-10a). Only when the price for their services was increased did the lawyers' boycott end (*id.* at 11a).

Ordinarily the facts above would more than suffice to demonstrate both a *per se* violation of the antitrust laws and adverse effects necessary to obviate any showing of market power under a full rule of reason analysis. See, *e.g.*, *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). In respondents' view, however, the tribunal must further decide (1) whether the concerted refusal to deal is a "legislative petitioning boycott" and (2) if so, do the boycotters have "market power?" To describe these inquiries as a "sea of doubt" understates their complexity.[24]

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[24] In respondents' view, to determine whether the price-fixing boycott in question was a "petitioning boycott," the tribunal must scrutinize the motives and attitudes of both the boycotters and officials of the target government. Did the boycotters seek to "communicate" or to "coerce" when they withheld their services? And did officials of the targeted government feel "coerced" or "persuaded" by the boycott? If one rejects the pragmatic, objectively based analysis of these questions performed by the Commission and ALJ (see FTC Br. 41-42), as respondents do, the result is an inquiry of inordinate complexity, that reduces the tribunal to measuring the sincerity and authenticity of "smil[es]" (SCTLA Br. 13), "hand[shakes]" (*id.* at 17), and "cocktail reception[s]" (*id.* at 18), to arrive at the appropriate mode of antitrust analysis.

If the conduct is determined to be a "petitioning boycott," the tribunal must then assess market power. SCLTA apparently maintains that the fact that a D.C. bar member did not compete for CJA assignments prior to the boycott would not warrant exclusion from the market (Br. 48 n.35). While rejecting this usual test of market participation, however, SCTLA does not explain how else one decides which of 14,000 D.C. Bar members were market participants and which were not.

The argument for increasing CJA rates in 1983 no doubt had much to commend it. But every dollar that the City was required to pay to end a lawyers' boycott left it with that much less money to spend to feed the hungry, shelter the homeless, fight drugs, disease, and crime, or accomplish any number of other perennially underfunded public missions that compete with indigent legal care for limited public funds. The antitrust laws exist to ensure that, in allocating scarce resources, governments and all other purchasers enjoy the benefits of competition among suppliers. As this Court has observed, the Sherman Act

> rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

NCAA v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 104 n. 27, quoting *Northern Pacific R.R.* v. *United States*, 356 U.S. at 4-5.

The assurance of the lawyers and doctors appearing before this Court that their causes are unique and their claims on the public purse are uniquely compelling cannot justify the unprecedented antitrust treatment they demand. The "economic liberty" that the Sherman Act guarantees all buyers (*NCAA*, 468 U.S. at 104 n.27) need not be subordinated to the novel right to engage in

"expressive price-fixing" demanded by the respondents in this case.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed insofar as it vacates the decision of the Commission.[25]

Respectfully submitted.

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AUGUST 1989

[25] We agree with respondents (SCTLA Br. 21 n.10; Ind. Br. 13 n.6) that in such event the case should be remanded to the court of appeals to consider respondents' unaddressed objections to the scope of the order to cease and desist against them.

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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Nos. 88-1198, 88-1393

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

FEDERAL TRADE COMMISSION

Petitioner,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,

Ralph J. Perrotta
Karen E. Koskoff
Reginald G. Addison
Joanne D. Slaight

Respondents.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,

Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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June 22, 1989 (Additional Counsel Listed Inside)

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INTRODUCTION

The Amici States submit this brief in support of the Petitioner Federal Trade Commission. The decision of the District of Columbia Circuit in *Superior Court Trial Lawyers Association v. Federal Trade Commission*, 856 F.2d 226 (D.C. Cir. 1988), should be reversed.

INTEREST OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted expansion of immunity from the antitrust laws. First, the attorneys general are the chief law officers of their states and are charged with the duty of enforcing the antitrust laws. As such, they are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law.[1] The attorneys general also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[2] The states play a major role in antitrust enforcement and have a substantial interest in making sure that the antitrust laws are interpreted in accord with antitrust policy and the Supreme

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[1] E.g., *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 1989 (CCH) Trade Cas. ¶ 68,575 (Tex. Civ. App. 1989).

[2] 15 U.S.C. § 15(c); *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439 (1945) (common law parens patriae); *Hawaii v. Standard Oil*, 405 U.S. 251 (1972).

Court's prior decisions. Immunizing boycotts that are utilized to impose price-fixing agreements ("price-fixing boycotts") would allow anti-competitive conspiracies to continue unchecked.

Moreover, the attorneys general represent municipalities, counties, state agencies and other governmental entities whose purchases together account for 12% of the gross national product.[3] The attorneys general have a vital interest in maintaining the integrity of the process by which those transactions are accomplished. The novel exemption fashioned by the court of appeals would corrupt the process by which governments acquire goods and services and would virtually invite imposition of price-fixing boycotts against governments.

In addition, these local governments administer numerous programs similar to the District of Columbia's program for appointment of private counsel to represent indigent persons charged with crimes in the District of Columbia Superior Court. Expanding the limits of First Amendment protection in the manner urged by the respondent Superior Court Trial Lawyers ("SCTLA") would create an enormous loophole in antitrust law that would inevitably impede states' efforts to preserve and foster competition.

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[3] U. S. Bureau of the Census, statistical Abstract of the United States 1989, at 421 (109th ed. 1988). In 1987, state and local government purchases amounted to 542.8 billion dollars. *Id.*

As the primary public enforcers of the state antitrust laws and as representatives of the primary victims of the anticompetitive conduct encouraged by the lower court's opinion, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.

The Amici States support the Federal Trade Commission's contention that a price-fixing boycott directed at a government purchaser is a *per se* violation of the Sherman Act without regard to a demonstration of market power.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the "use of the *per se* rule without proof of market power is inappropriate as applied to a price-fixing boycott that served, in part, to make a statement on a matter of public debate." This Court's most recent pronouncement of the *Noerr* doctrine[4] in *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988), resolves the question whether a price-fixing boycott, such as that at issue here, is protected activity under the First Amendment and beyond the reach of the Sherman Act. Under *Allied Tube*,

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[4] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 123 (1961).

the SCTLA's price-fixing boycott at issue is not protected as "political activity" and is not protected as a "political boycott." It was unnecessary and redundant for the court of appeals to analyze the price-fixing boycott as "expressive conduct." The proper way to address the First Amendment concerns is with application of the *Noerr* doctrine and not by eroding the *per se* rule.

2. The court of appeals concluded that before a price-fixing boycott could be declared unlawful, proof of significant market power was required in order to demonstrate that the boycott succeeded because it was coercive rather than persuasive. The court of appeals' holding contravenes over eighty years of antitrust jurisprudence in which this Court has consistently held that horizontal combinations formed for the purpose and effect of tampering with the price of a commodity and service are unlawful *per se* under the Sherman Act. Such agreements are unlawful *per se* without any demonstration of market power. Requiring proof of market power to condemn a price-fixing boycott is unprecedented and creates formidable barriers to antitrust enforcement. Moreover, it replaces the efficiency and clarity of the *per se* rule with a novel market power test that promotes confusion.

3. The court of appeals' application of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The absence of market power does not justify a naked restriction on price or output.

Moreover, the purpose of inquiries into market power is to determine the actual or potential anticompetitive effects of an arrangement. Proof of actual anticompetitive effects obviates the need for inquiry into market power. The court of appeals rejected traditional demonstrations of market power and required proof of market power sufficient to demonstrate that the boycott succeeded because it was "coercive rather than persuasive." Such a requirement is unprecedented and is virtually impossible to apply. The court of appeals gave no useful guidance regarding what level of market power suffices to render unlawful a price-fixing boycott that is claimed to be "expressive conduct."

4. If the defense that price-fixing is being used to communicate a point of view can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. It will substantively weaken antitrust enforcement and will encourage price-fixing at least with respect to goods and services purchased by governments.

ARGUMENT

The court of appeals held that a concerted boycott by competing private practice attorneys in order to increase fees paid for their representation of indigent criminal defendants may be constitutionally protected activity. The court recognized that the SCTLA boycott could properly be condemned as a *per se* violation of the Sherman Act unless it came within the protection of the First

Amendment. *Superior Court Trial Lawyers Association*, 856 F.2d at 241.[5]

In reviewing possible sources of protection, the court rejected the claim that SCTLA's conduct was entitled to complete First Amendment immunity under the *Noerr* doctrine. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court also rejected SCTLA's contention that its conduct was a "political boycott" and thereby completely immune under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *Id.* Though the court of appeals found the boycott was not immune from the antitrust laws under either *Noerr* or *Claiborne*, it concluded that the conduct could not be condemned without proof of market power. The court reached this conclusion by applying the test for evaluating "expressive conduct" articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). In applying the *O'Brien* test, the court concluded that use of the *per se* rule "without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate." *Superior Court Trial Lawyers Association*, 856 F.2d at 250.

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[5] "Since no 'pro-competitive' justification, that is no justification that is consistent with the purposes of the antitrust laws, has been offered in its defense . . . the boycott could properly be condemned as a *per se* violation of section 1 of the Sherman Act. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 241.

I. THE COURT OF APPEALS EVISCERATES THIS COURT'S DECISION IN *ALLIED TUBE*.

The Amici States assert that the court of appeals erred when it applied the *O'Brien* test after holding that SCTLA's horizontal price-fixing boycott was not immunized under *Noerr* or *Claiborne Hardware* pursuant to this Court's guidance in *Allied Tube*. *Allied Tube* is controlling precedent which resolves the First Amendment issues the court of appeals raised by applying the *O'Brien* test. The court of appeals' action has the effect of nullifying the precedential value of *Allied Tube* in governing the application of the Sherman Act to restraints of trade like the SCTLA boycott.

In the development of the *Noerr* doctrine, this Court has crafted a careful balance between the Sherman Act and the First Amendment. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988). There this Court recognized that the antitrust laws do not apply to concerted solicitation of anticompetitive government action unless the concerted solicitation itself amounts to a mere sham.

The Court in *Noerr* defined for the first time the relationship between the First Amendment right to petition and the Sherman Act. The Court held that an open public campaign designed to influence the legislature would not violate the antitrust laws even though it had an anticompetitive effect. This Court refused to "lightly impute to Congress an intent to invade [First Amendment] freedoms." 365 U.S. at 138. It reasoned that the legislative history of the Sherman Act provided no basis for concluding that its purpose was "to regulate, not business activity, but political activity." *Id.* at 137. In *Pennington*, the Supreme Court extended the doctrine to attempts to influence the executive branch. This Court stated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

In *Allied Tube*, however, this Court determined that even apart from any finding of mere sham, the *Noerr* doctrine does not immunize all petitioning conduct. This Court held that *Noerr* immunity does not protect the collective efforts of a private standards setting organization merely because the model codes agreed upon are subsequently adopted by governments. This Court established guidelines for determining whether collective conduct falls within the ambit of *Noerr*. There the Court said that "the scope of protection depends on the source context, and nature of the anticompetitive restraint at issue." *Allied Tube*, 108 S. Ct. at 1936.

In the instant case, the court of appeals acknowledged that "dicta in *Allied Tube* strongly suggest that *Noerr* does not extend to restraints indistinguishable from the one before us." *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals quoted the following passage from *Allied Tube*:

> We cannot agree with Petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia v. Evans*, 316 U.S. 159 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

Allied Tube, 108 S. Ct. at 1938-39 (parallel citations omitted). The court of appeals correctly determined that *Noerr* immunity was not available

to protect the SCTLA boycott from antitrust scrutiny. *Superior Court Trial Lawyers Association*, 856 F.2d at 247.

Moreover, respondents' boycott is not entitled to First Amendment protection as a "political boycott" under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). There, this Court held that a boycott of white retailers by black consumers in order to vindicate important constitutional rights was protected by the First Amendment from a claim that it violated state tort law. The "political boycott" doctrine articulated in *Claiborne Hardware*, however, does not encompass commercial boycotts by economic competitors who stand to reap economic benefit for themselves. Citing *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the *Claiborne* Court said, "[t]he right of business entities to 'associate' to suppress competition may be curtailed." *Id.*

In *Allied Tube*, this Court reiterated that *Claiborne Hardware* is limited to cases that do not involve economic competitors seeking economic benefits.

> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is not to the contrary. In that case we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of

> demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, 458 U.S., at 914-915. Here, in contrast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.

Allied Tube, 108 S. Ct. at 1941 (parallel citations omitted).

The court of appeals applied the *Claiborne Hardware* analysis to the SCTLA boycott and concluded that it was outside the protection of the First Amendment. The court noted that the First Amendment protection in *Claiborne Hardware* "rests on the findings that the boycott was not motivated by any desire to lessen competition or to reap economic benefits. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 245.

The cited passages from *Allied Tube*, although dicta, virtually dispose of the SCTLA boycott as if it were then before the Court. The SCTLA boycott is not "political activity" protected by the *Noerr* doctrine and is not a "political boycott" protected by *Claiborne Hardware*. The court of appeals concluded, however, that the absence of protection

under either *Noerr* or *Claiborne Hardware* did not conclusively resolve the claim that the SCTLA's boycott is entitled to First Amendment protection.

Notwithstanding the court of appeals' recognition and application of *Allied Tube* in reviewing the SCTLA's boycott, the court determined further analysis was needed before the boycott could be condemned under the Sherman Act. The court's justification for further analysis was the presence of an element of expression contained in the boycott warranting First Amendment protection. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals turned to the test first enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), to evaluate the First Amendment protection of "expressive conduct." This four-part test was devised by this Court to determine whether a Vietnam War protestor's draft card burning was protected under the First Amendment. This Court held that a "regulation is sufficiently justified (1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial government interest; (3) if the government's interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms was no greater than is essential to the furtherance of that interest." *Id.* at 377.

The court of appeals easily found that condemnation of the SCTLA boycott met the first three parts of the *O'Brien* test. *Superior Court Trial Lawyers Association*, 856 F.2d at 248. With

respect to the fourth requirement, however, -- that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of the governmental interest -- the court of appeals concluded that a demonstration of market power was essential to evaluating the importance of the governmental interest at stake here.

It was error to use the *O'Brien* test after the court had already determined that under *Allied Tube* the price-fixing boycott was commercial activity primarily motivated by economic self-interest and thereby within the reach of the Sherman Act. In determining that the boycott was commercial activity and not political activity, the Court had already balanced the respective interests of society in our system of free enterprise with its unfettered marketplace against the First Amendment rights of speech and petition. The court of appeals recognized that it was in fact "[a]ccommodating the government's interest in regulating harmful economic activity to the right of citizens to engage in joint political action. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 246.

The *O'Brien* balancing of governmental rights against individual rights was subsumed in the court of appeals' *Allied Tube* analysis because *Noerr* and *Claiborne Hardware*, in essence, address in an economic setting petitioning the government and speech elements of a boycott as "expressive

conduct."[6] The court of appeals analyzed the SCTLA boycott under *Allied Tube*, balanced the competing interests, and concluded that the government's interest predominates, that is, the Sherman Act was applicable to declare the price-fixing boycott unlawful.

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[6] In *Claiborne*, this Court addressed the validity of economic regulation that "may have an incidental effect on rights of speech and association." *Claiborne Hardware*, 458 U.S. at 912. In *Claiborne*, this Court applied the *O'Brien* test to evaluate the validity of economic regulation that would have rendered the NAACP boycott unlawful, *Id.* at n.47. *Claiborne* analyzed the "petitioning" element of the NAACP boycott under *Noerr*. *Id.* at 913-14. ("It is not disputed that a major purpose of the boycott in this case was to influence governmental action.") The speech element was evaluated under the *O'Brien* test. "The established elements of speech, assembly, association and petition, though not identical, are inseparable." *Id.*, at 911. The following passage from *Noerr* demonstrates that there, the court was in fact engaged in the same sort of analysis.

> The proscription of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. *Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities*, a caution which has been reflected in the decisions of this court interpreting such legislation.

Noerr, 365 U.S. at 141.

To balance these interests once again under *O'Brien* in the guise of "expressive conduct" was redundant. Embarking on the *O'Brien* test after having already determined that the boycott was within the reach of the Sherman Act was error. The court of appeals compounded its error when it reached inconsistent conclusions using the two approaches. The court of appeals in applying *O'Brien* lost sight of the fact that the *Allied Tube* analysis is by its nature limited to an inquiry into whether antitrust laws apply to particular conduct at all. In that sense, *Allied Tube* is a restatement of the *O'Brien* test appropriate to the commercial context of the antitrust laws. Neither *O'Brien* nor *Allied Tube* stand as a warrant for the court to have engaged in wholesale reordering of rules of law already found applicable.

II. THE COURT OF APPEALS' ABROGATION OF THE *PER SE* RULE OBSTRUCTS EFFECTIVE ANTITRUST ENFORCEMENT.

The court of appeals' application of the *O'Brien* case to the facts here is unprecedented. It determined that a naked price-fixing boycott that resulted in actual detrimental effects, could not, on that basis alone, be condemned. This determination was based upon the fact that overt acts in furtherance of the restraint of trade constituted "expressive conduct" which raised First Amendment considerations. The court of appeals concluded that before the restraint of trade could be declared unlawful, proof of significant market power -- which would conclusively demonstrate that the

boycott succeeded because it was "coercive rather than persuasive" -- was required. *Superior Court Trial Lawyers Association*, 856 F.2d at 253.

The court of appeals' holding contravenes over eighty years of precedent, in which this Court has constantly adhered to the principle that horizontal combinations formed for the purpose and effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity or service are unlawful *per se* under the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *See also United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). The court of appeals' determination also contravenes this Court's statement that even under rule of reason analysis, proof of market power is not necessary to determine the unreasonableness of a restraint of trade if actual anticompetitive effects are shown. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

To require proof of "market power" to condemn a naked price-fixing boycott creates a formidable obstacle to state and federal enforcement of the antitrust laws. The court of appeals' novel market power requirement would, if adopted, complicate, forestall, and possibly preclude condemnation of clearly anticompetitive conduct and weaken deterrence of undesirable economic behavior.

The court of appeals' subordination of the antitrust rights of the public to economic interests

of competing businessmen is inconsistent with previous statements of this Court regarding the importance of those antitrust rights. For example, this Court, in *United States v. Topco Associates*, 405 U.S. 596, 610 (1972), stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

Next, the court of appeals also reasoned that the *per se* rule could be abandoned here because it is not a statutory command, but merely a rule of administrative convenience. *Superior Court Trial Lawyers Association*, 856 F.2d at 249. The *per se* rule is more than an administrative convenience,[7]

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[7] Moreover, the court of appeals erred in concluding that the *per se* rule, even if viewed only as an administrative aid, should not be upheld under the *O'Brien* test. In *United States v. Albertini*, 472 U.S. 675 (1985), this Court held that the general exclusion of a "bar letter" receipient from a military open house does not violate the First Amendment, stating that:

> Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. (Citation omitted.) Instead, an incidental burden on speech is no greater than is essential and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Id., at 689.

This Court has recognized that the "*per se* rule" is a valid and useful tool for antitrust policy and enforcement to preserve this nation's economic freedoms.[8] *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 5 (1978). This Court in *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 5 (1958) stated:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken.

See also 7 P. Areeda, *Antitrust Law*, ¶1509, at 408-414 (1986).

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[8] State antitrust law, either through case law or statute, expressly recognizes price-fixing agreements and other similar conduct as *per se* violations. *E.g.*, Conn. Gen. Stat. Sec. 35-28(a)-(d) (1989); *Wedgewood Investment Corp. v. International Harvester Co.*, 126 Ariz. 157, 613 P.2d 620 (App. 1978); *Oakland-Alameda County Builders' Exchange v. Lathrop Const. Co.*, 4 Cal. 3d 354, 362-365, 93 Cal. Rptr. 602, 482 P.2d 226 (Cal. 1971); *Colorado v. Colorado Springs Board of Realtors*, 692 P.2d 1055, 1062 (Colo. 1984).

If the defense of "expressive conduct" (i.e., that price-fixing is being used to communicate a point of view) can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. The result will burden litigation and, by holding out hope of exculpation, tempt more businessmen into naked trade restraints such as the price-fixing boycott at issue here. Thus, the "potential threat to the central nervous system of the economy," emasculation of the Sherman Act, and replacement of its philosophy with one which is "wholly alien to a system of free competition" apprehended and rejected by this Court in *Socony* will be revived.

In addition to prohibiting application of *per se* analysis, the court of appeals' use of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The court of appeals ignored this Court's statements in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109-10 (1984):

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.

The court of appeals recognized that the SCTLA boycott was a naked restriction on price or output but still held that market power analysis was essential before the boycott could be declared unlawful. *Superior Court Trial Lawyers Association, passim.*

The court of appeals' decision elevates market power from a mere "surrogate" for anticompetitive effects to the very measure of the government's interest in prohibiting restraints of trade. This application of market power analysis is without precedent.

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'
> 7 P. Areeda, Antitrust Law, ¶1511, p. 429 (1986).

FTC v. Indiana Federation of Dentists, 476 U.S. at 460-61.

The court of appeals accepted the Commission's findings of the SCTLA boycott's actual detrimental effects.[9] But, the court of appeals rejected the conclusion that such proven effects mandated a determination of unlawfulness. In addition, the court of appeals cautioned that even a finding of significant market power by the Commission on remand may not justify the condemnation of an "expressive" boycott. The court of appeals' imposed duty to weigh the value of alleged expressive conduct against the potential harm from such conduct, as measured by the participants' market power, obviously exceeds the proper role of any court.

The court of appeals' decision would replace the efficiency, clarity and certainty of the *per se* rule with a novel market power test that will promote confusion and attempted restraints of trade in the name of "expressive conduct." This decision is devoid of useful guidance to aid the Commission or the Amici States to determine what future expressive price-fixing boycotts and other types of *per se* restraints may remain unlawful.

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[9] The effects "dramatically reduced the supply of lawyers to the city's indigent defendant program; adversely affected the city's ability to meet constitutional obligations to provide counsel for indigent defendants; and forced the city government to increase CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [boycotters]." *See Superior Court Trial Lawyers Association*, 856 F.2d at 251.

The court's opinion, raises the possibility that society must tolerate anticompetitive activities if they can be successfully packaged as "expressive" boycotts.

The Amici States, therefore, respectfully request that this Court reject the court of appeals' market power requirement for horizontal price-fixing boycotts and other types of conduct that have been previously determined by this Court to be unlawful *per se*. The application of market power analysis to substantiate an otherwise naked restriction on competition whenever "expressive conduct" is present, emasculates the Sherman Act, removes the deterrent effect of the *per se* rule and restricts effective law enforcement. The proper balancing test is that expressed in *Allied Tube* concerning applicability of the *Noerr* doctrine and *Claiborne Hardware*.

III. CROSS-PETITIONERS' CLAIM THAT THEIR PRICE-FIXING BOYCOTT IS "POLITICAL ACTIVITY" BEYOND THE REACH OF THE ANTITRUST LAWS IS WITHOUT SUPPORT.

Respondents, through their cross-petition, attempt to shroud their naked price-fixing boycott from antitrust scrutiny by asserting that the boycott is protected under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), as "political" activity. The Amici States are aware of no legal basis or case precedent to support respondents' claims. As presented earlier, *Allied Tube* resolves this issue.

Moreover, respondents' claimed motivation to advance the constitutional rights of indigent criminal defendants should not totally remove a price-fixing boycott from the scope of the antitrust laws. If so, antitrust enforcement will become dependent upon the creativity of the participants of a particular restraint of trade to invent political and social objectives for their anticompetitive actions. Businesses will use this "political activity protection" to apply coercive economic sanctions against governmental bodies to force regulatory changes concerning their businesses whenever they disagree with a governmental regulation or rule. It will also encourage predatory activities in the name of "political concerns." The court of appeals acknowledges as much in the following passage:

> [I]mmunizing all non-violent boycotts aimed at affecting the legislative process would free the businesses that must now compete to supply this tremendous demand instead to "lobby" for increases in the prices they receive by collectively withholding production. . . . This is the stuff of which economic chaos is made in countries that tolerate coercive political action by industry, and from which the Sherman Act has shielded this country for almost a century.

Superior Court Trial Lawyers Association, 856 F.2d at 247.

The Amici States request that this Court reject respondents' argument. *Claiborne Hardware* does not permit the conclusion that a price-fixing

boycott or other restraints of trade are "political" activity protected under the First and Fourteenth Amendments whenever political and social objectives may be advanced. Indeed, this Court previously rejected this exact argument. In *Allied Tube*, this Court determined that restraints of trade are not protected under *Claiborne Hardware* where the participants were "at least partially motivated by the desire to lessen competition, and . . . stood to reap economic benefits. . . .," 108 S. Ct. at 1941.

Limiting *Claiborne Hardware* to situations where there is an absence of anticompetitive intent strikes a proper balance between First Amendment rights and government's legitimate and substantial interests in protecting competition. Reaffirming *Allied Tube* will continue to provide protection from the antitrust laws for true political activity such as occurred in *Claiborne Hardware* and *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). Price-fixing boycotts or other restraints of trade with political attributes such as occurred in *Allied Tube* and this case, however, will continue to be subject to the full force and effect of the federal and state antitrust laws.[10]

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[10] Respondents in their cross-petition have not challenged the FTC's factual determination that respondents' boycott was designed to restrain competition for the direct economic benefit of its members. Also, the court of appeals' opinion specifically affirmed the FTC's finding that the boycott was motivated primarily by "economic self-interest." *Superior Court Trial Lawyers Association*, 856 F.2d at 246. These facts preclude a determination that respondents' boycott was "political" activity entitled to First Amendment protections.

Price-fixing boycotts and other restraints of trade performed with anticompetitive intent cannot be condoned as part of the "political" process.

CONCLUSION

The District of Columbia Circuit's opinion should be reversed.

DATED June 22, 1989
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AMICUS CURIAE

BRIEF

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Nos. 88-1198 and 88-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION,
Petitioner,
v.
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Respondents.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,
v.
FEDERAL TRADE COMMISSION,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

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July 28, 1989

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QUESTIONS PRESENTED

1. Whether the First Amendment protects the right of a professional association and its members to engage in an expressive boycott designed to publicize and enlist political support for a legislative increase in the rate of reimbursement for members' services.

2. Whether an expressive boycott may be condemned under the antitrust laws without proof that the participants had market power, *i.e.*, that they had the capacity to cause any actual harm to competition.

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IN THE

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FEDERAL TRADE COMMISSION,

Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

The American Medical Association respectfully submits this brief as *amicus curiae* in support of the Superior Court Trial Lawyers Association, *et al*. The written consent of all parties has been obtained and filed with the Clerk in accordance with Supreme Court Rule 36.2.

INTEREST OF AMICUS CURIAE

The American Medical Association ("AMA") is a private, voluntary, nonprofit organization of physicians. The AMA was founded in 1847 to promote the science and art of medicine and the improvement of the public health. Its membership exceeds 280,000 physicians and medical students.

The AMA is dedicated to promoting the public welfare through the maintenance of appropriate professional standards and the provision of quality health care. To this end, the AMA and its members participate in a wide range of educational, informational, and certification programs. The AMA also advocates policy positions on public issues that affect the quality and availability of medical care. In particular, the AMA regularly takes positions upon proposed legislation that would affect the care provided under government-supported medical benefits programs such as Medicare and Medicaid.

In this case, the Federal Trade Commission ("FTC" or "Commission") has challenged the activities of the Superior Court Trial Lawyers Association ("SCTLA"), a professional association of lawyers who represent criminally accused indigents in the District of Columbia courts. The SCTLA organized a collective refusal to accept new case appointments under the District's Criminal Justice Act, D.C. Code Ann. §§ 11-2601 through 11-2609 (1981 and 1988 Supp.), for the purpose of obtaining public and political support for a legislative increase in the hourly reimbursement rates paid to its members. The Commission has taken the position that the SCTLA's activities are entitled to no First Amendment protection and are properly condemned as a *per se* violation of the antitrust laws.

The AMA recognizes that preservation of this nation's trade freedom depends upon vigorous enforcement of the antitrust laws. It does not advocate strikes or boycotts by competitors collectively exercising market power. However, the AMA believes that the Commission's approach to this case shows insufficient regard for the First Amendment rights of professional associations and their members. The AMA's interest in this case is to support the right of professional associations to use effective means to express their views to the government, including their views on appropriate levels of reimbursement.

In the AMA's view, the court of appeals in this case struck an appropriate balance between the vital interest in unfettered competition and the "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The AMA therefore files this brief as *amicus curiae* to urge the Court to affirm the ruling of the court of appeals.[1]

STATEMENT

1. This case involves a boycott by a professional association of lawyers aimed at influencing District of Columbia officials to increase reimbursement rates for lawyers who represent indigent defendants in criminal cases. The boycott—or "strike" as it was referred to by the participants and the media —was organized by the SCTLA, a professional association of lawyers who accept case assignments under the District of Columbia Criminal Justice Act, D.C. Code Ann. §§ 11-2601 through 11-2609 (1981 and 1988 Supp.) ("the CJA"). The boycott was part of a larger, ultimately successful, political and publicity campaign to persuade the District of Columbia legislature that the CJA reimbursement rates were inadequate.

At the time of the boycott in 1983, fees for CJA cases had not been increased since 1970. The fees were set at $20 an hour for out-of-court time and $30 an hour for in-court time, with a per case maximum of $400 for misdemeanors, $1000 for felonies, and $1000 for appeals. Even at the time these rates were established in 1970, they were viewed as low. S. Rep. No. 790, 91st Cong., 2d Sess. 14-15 (1970). Justice Powell referred to the rates as "low

[1]This brief addresses the issues raised in the Commission's petition for certiorari, Case No. 88-1198. The AMA does not address the extent to which particular forms of political activity are entitled to categorical immunity from the antitrust laws under this Court's decisions in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), or the *Noerr - Pennington* line of cases. *See United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

by American standards" and noted that "the majority of persons willing to accept appointments are the young and inexperienced." *Argersinger* v. *Hamlin*, 407 U.S. 25, 57 n.21 (1972) (concurring opinion). From the mid-1970s until the time of the boycott, a number of bar associations and judicial groups issued reports commenting upon the inadequacy of the rates and urging a legislative increase to ensure adequate representation for the indigent accused. 856 F.2d at 229; 107 F.T.C. at 534.[2]

In the summer of 1982, the SCTLA leadership began a lobbying campaign to increase the CJA compensation rates. *Id.* Their efforts included meetings with the Mayor of the District of Columbia, the Chief Judge of the Superior Court, and other District of Columbia officials. *Id.* at 535-537. Several of these officials stated privately that they believed an increase was warranted, but indicated that the lawyers "would have to generate the political support for it." *Id.* at 535.

In March 1983, D.C. Council Chairman Clarke introduced Bill No. 5-128 to raise the CJA rates to $35 per hour for both in-court and out-of-court time. Although SCTLA members lobbied on behalf of the bill, it soon became apparent that the bill lacked the support necessary for enactment. Support grew among the SCTLA members for dramatic action to publicize and gain political support for their campaign. At an SCTLA meeting of August 11, 1983, the lawyers voted to "strike"—*i.e.*, to continue to represent clients on existing matters, but to stop accepting new CJA appointments as of September 6 if no legislative action was taken by that date. 107 F.T.C. at 539.

The strike began as planned on September 6, 1983 and lasted for about two weeks. During that period, the SCTLA scheduled

[2]The following citation forms are used in this brief: "856 F.2d" refers to the court of appeals opinion; "107 F.T.C." refers to the opinions of the administrative law judge and the Commission; "J.A." refers to the joint appendix filed in this Court; and "FTC Br." refers to the Commission's brief before this Court.

a series of events—rallies, picket lines, handouts of press kits, and newspaper and television interviews—designed to educate the public about the inadequacy of CJA reimbursement rates. *Id.* at 543. The strike enabled SCTLA to obtain widespread media coverage of the reimbursement issue. (*E.g.*, J.A. 900, 921-22, 934, 946, 954).

On September 16, 1983, ten days after the strike began, the Mayor wrote to Council member Rolark expressing his willingness to support Bill No. 5-128. The same day, Rolark and Council Chairman Clarke met with the SCTLA lawyers and advised them that they would support the bill. Chairman Clarke presented the bill as a "take it or leave it proposition," and indicated that nothing would be passed if the lawyers rejected it. 107 F.T.C. at 548. Three days later, the SCTLA voted to accept the $35 per hour rate. The D.C. Council then passed Bill No. 5-128 and the Mayor —stating that "I believe in the importance of quality representation for indigent defendants and believe that this will contribute to the administration of justice in the District"—signed the bill. (J.A. 961). On September 21, 1983, the SCTLA lawyers resumed accepting new appointments under the CJA. 107 F.T.C. at 548-49.

2. On December 16, 1983, the Commission filed a complaint against the SCTLA and four of its individual members alleging that the concerted refusal to accept new case appointments was an unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.[3] Following a three-week hearing, an administrative law judge ("ALJ") dismissed the complaint. The ALJ concluded that, rather than being anticompetitive, the strike merely made it politically possible for District officials to imple-

[3]The Commission throughout the proceedings below relied on standards derived from this Court's cases interpreting § 1 of the Sherman Act, 15 U.S.C. § 1. Accordingly, the AMA will discuss the issues in this case in terms of the Sherman Act.

ment an increase in reimbursement rates that everyone agreed were "woefully inadequate." 107 F.T.C. at 509.

On appeal from the ALJ's decision, the Commission held that the SCTLA boycott was a *per se* violation of the antitrust laws. The Commission rejected the SCTLA's argument that the political dimensions of the boycott made *per se* treatment inappropriate. In the Commission's estimation, the strike was indistinguishable from those naked restraints on price and output that have been condemned under the antitrust laws without examination of their actual competitive effects. *Id.* at 575.

Alternatively, the Commission held that the SCTLA strike failed a rule of reason test. In reaching this conclusion, however, the Commission did not (1) define a relevant market, (2) determine the lawyers' market share, or (3) make any specific findings regarding market power. 856 F.2d at 250. Notwithstanding the absence of such findings, the Commission concluded that the boycott had harmed competition, and that "a direct causal link" existed between the boycott and the D.C. Council's decision to increase fees. 107 F.T.C. at 578.

3. The court of appeals reversed and vacated the Commission's order and remanded for additional proceedings to determine whether the boycott participants had market power. The court found that, while the SCTLA's conduct was not entirely exempt from the antitrust laws, it "did contain an element of expression warranting First Amendment protection." 856 F.2d at 248. The court therefore applied the test for analyzing expressive conduct set forth by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968).

Under that test, the court found, the Commission's application of a *per se* rule violated the requirement that any incidental limitation on First Amendment freedoms be "no greater than is essential" to the furtherance of a substantial government interest.

Although the court did not question that the government has a substantial interest in preventing unreasonable restraints of trade, it held that the Commission's *per se* approach swept more broadly than necessary to effectuate that interest. Further, the court held that an inquiry into market power was necessary to determine whether the increased rates were in fact the product of economic coercion rather than a successful political lobbying campaign. 856 F.2d at 251-52.

The court directed the Commission, on remand, to define a relevant market, to estimate the boycott participants' share of that market, and to assess the significance of that market share in light of other factors relevant to the exercise of market power. It further instructed the Commission to determine, if market power is present, "how much market power is sufficient to justify the condemnation of an expressive boycott." *Id.* at 252. "Clearly," the court concluded, "the First Amendment concerns implicated by expressive boycotts require that they not be condemned if their ability to harm competition is insignificant." *Id.* at 252-53.

SUMMARY OF ARGUMENT

In its decision below, the Commission attached no significance to the communicative purposes of the SCTLA boycott or the political context in which it occurred. It therefore perceived no necessity to tailor its analysis to avoid condemning competitively harmless expressive activity. The Commission treated this case precisely as it would a "naked price fixing boycott." FTC Br. at (i).

The First Amendment requires a more discriminating analysis, however. If examination of the entire "factual context and environment" of the case indicates that the challenged conduct is expressive, then the conduct must be evaluated under the applicable First Amendment standard of review. *Spence* v. *Wash-*

ington, 418 U.S. 405, 409-10 (1974).[4] Specifically, if the conduct is speech-related, then any governmental regulation of the conduct must be narrowly tailored to further a substantial government interest. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). It is therefore essential, at the outset, to determine whether the SCTLA boycott is an activity protected by the First Amendment.

1. For at least three reasons, the SCTLA's activities are entitled to First Amendment protection. First, the boycott involved a matter of critical public importance: the appropriate level of reimbursement for professionals offering publicly-supported legal services for the poor. The SCTLA's activities were intended to communicate the boycott participants' opinions regarding this issue and were reasonably understood as doing so by the media and general public. Such communication regarding matters of public concern implicates core First Amendment values.

Second, the boycott was essential for the SCTLA lawyers to express their views in an effective manner. Although boycotts can pose a threat of harm to competition, they are also a recognized form of group advocacy. A balancing test provides an appropriate method of accommodating the expressive value of certain boycotts, without insulating from antitrust scrutiny conduct that is demonstrably harmful to competition.

Third, the boycott represented a genuine attempt to influence governmental action. As this Court recognized in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a representative form of government depends upon the free flow of information between the citizenry and its repre-

[4]*Spence* held that displaying the American flag with a peace symbol affixed "at a time of national turmoil over the introduction of United States forces into Cambodia and the deaths at Kent State University" was expressive. 418 U.S. at 414 n.10; *see also Texas* v. *Johnson*, 57 U.S.L.W. 4770 (June 21, 1989) (burning flag as part of demonstration outside Republican National Convention held expressive); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming *arguendo* that sleeping in public park to dramatize plight of homeless was expressive).

sentatives. That the views communicated by the SCTLA boycott are consistent with the economic self-interest of the lawyers does not diminish, and in fact may enhance, the boycott's informational value. Even assuming that the boycott is not entirely exempt from antitrust liability under *Noerr*, the interests identified in that decision support an intermediate form of First Amendment protection for genuine petitioning activity.

2. Summary condemnation of the SCTLA boycott is inappropriate both as a matter of antitrust law and of constitutional law. According to basic antitrust principles, *per se* treatment is reserved for conduct that is manifestly anticompetitive. An expressive boycott, rather than being a "naked" restraint of trade, has the potential to enhance competition by improving the ability of a purchaser—in this case the District—to define and implement its purchasing objectives. Indeed, the SCTLA boycott may have performed the procompetitive function of informing District policymakers that they were purchasing a lesser amount or quality of CJA legal services than the public desired.

But even if the boycott were otherwise illegal *per se*, its First Amendment implications would require the Commission to measure the lawyers' market power before pronouncing their conduct unlawful. Because their conduct was expressive, any restrictions on the lawyers' activities must be "no greater than is essential" to the furtherance of a substantial governmental interest. *O'Brien*, *supra*, 391 U.S. at 377. Although the government has an important interest in preserving competition, that interest is not even called into play unless the boycott had a clearly demonstrated ability to harm competition—*i.e.*, unless the participants had market power. *Per se* rules may serve a secondary interest in administrative convenience, but that interest is not sufficient to justify the suppression of expressive activity that may not substantially harm competition. Stated another way, the overinclusiveness of the *per se* rule—its condemnation of some

procompetitive or competitively neutral arrangements—cannot be tolerated as applied to activities protected by the First Amendment.

The Commission's argument that a legislative increase in reimbursement rates constitutes sufficient evidence of competitive harm is also unavailing. As the court of appeals explained, in the context of an expressive boycott, it cannot readily be determined whether political or economic power is the cause in fact of a favorable governmental action. An inquiry into market power is necessary to determine, as a preliminary matter, whether the boycott participants *could have* restrained trade. To the extent that the increase enacted by the D.C. Council was the result of political factors rather than the exercise of market power, the SCTLA boycott should not be actionable under the antitrust laws.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHT OF A PROFESSIONAL ASSOCIATION AND ITS MEMBERS TO ENGAGE IN AN EXPRESSIVE BOYCOTT DESIGNED TO PUBLICIZE AND ENLIST POLITICAL SUPPORT FOR A LEGISLATIVE INCREASE IN THE RATE OF REIMBURSEMENT FOR MEMBERS' SERVICES.

Whether particular conduct implicates the First Amendment depends upon "the nature of the . . . activity, combined with the factual context and environment in which it was undertaken." *Spence* v. *Washington*, 418 U.S. 405, 409-10 (1974). Examination of the entire record in this case indicates that the SCTLA's activities were "sufficiently imbued with elements of communication to fall within the scope" of the First Amendment. *Id.* at 409; *Texas* v. *Johnson*, 57 U.S.L.W. 4770, 4772 (June 21, 1989). Three separate elements of the SCTLA's conduct warrant First Amendment protection: (1) the SCTLA's activities involved a matter of public importance; (2) collective action by the SCTLA lawyers

was essential to effective advocacy; and (3) the SCTLA's activities represented a genuine attempt to influence governmental action.

A. The SCTLA's Activities Involved a Matter of Public Importance.

The SCTLA's activities conveyed the lawyers' viewpoint regarding the appropriate level of reimbursement for lawyers who defend the indigent criminally accused. (J.A. 184). In the District of Columbia as in states and municipalities around the nation, the extent of the governmental commitment to fund basic services for the poor is a public issue of profound importance. Benefits programs involving legal services, health care, and housing are regularly the subject of debate in the pages of newspapers and magazines and the halls of state legislatures and Congress. Far more than the income of providers is at stake in these debates: The level of reimbursement affects both the availability and the quality of basic services for the poor. These debates therefore implicate fundamental national values.

Because debate on public issues "has always rested on the highest rung of the hierarchy of First Amendment values," *Carey* v. *Brown*, 447 U.S. 455, 467 (1980), this Court has taken particular care to ensure that conduct occurring in the context of a political conflict be regulated only to the extent necessary to further a substantial government interest. In *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982), for example, the Court held that the State of Mississippi could not impose tort liability for the non-violent elements of a boycott organized by the NAACP and directed at local white merchants. A critical consideration in the Court's analysis was that the boycott was designed to dramatize the protestors' concern with racial prejudice, a matter of unquestioned public importance. *Id.* at 912; *see also Thornhill* v. *Alabama*, 310 U.S. 88, 101 (1940) (picketing to publicize views on "matters of public concern" held protected).

The plight of the SCTLA lawyers and their clients is clearly an important public issue. (J.A. 326-27, 389-90). Without adequate reimbursement, the SCTLA lawyers could be forced to cease providing representation for the poor. In particular, those SCTLA lawyers with the most skills and experience would face strong incentives to abandon their CJA practices and shift their attention to more lucrative areas of law. (J.A. 765). Other SCTLA lawyers might leave the practice of law entirely. As a consequence, the indigent accused in the District of Columbia could have difficulty securing adequate representation.

Moreover, the record demonstrates that the SCTLA's activities were both genuinely intended to draw public attention to these issues and reasonably understood as communicating the message. *Spence*, *supra*, 418 U.S. at 410-11; *Texas* v. *Johnson*, *supra*, 57 U.S.L.W. at 4772. The SCTLA lawyers had been advised by public officials that, to obtain a legislative increase, they "would have to generate the political support." 107 F.T.C. at 535. They responded by organizing the refusal to accept new appointments as a dramatic means of calling public attention to the issue. By distributing leaflets and organizing rallies and picket lines, they actively solicited, and ultimately obtained, widespread media coverage. (J.A. 914-54). That the media and general public responded to the protestors' efforts confirms both that the boycott served "to make a statement on a matter of public debate," 856 F.2d at 250, and that it was perceived as doing so by the protestors' intended audience.[5]

[5]Had the protest not involved an issue of public concern—if nothing more than the economic interests of the protestors had been at stake—presumably neither the media nor the public would have responded. *Cf. Mount Healthy City School Dist. Board of Education* v. *Doyle*, 429 U.S. 274 (1977) (radio coverage of controversy suggests that public issue is involved and that First Amendment standards apply). They surely would not have responded as they did, with widespread declarations of support and sympathy for the protestors.

B. Collective Action by the SCTLA Lawyers Was Essential to Effective Advocacy.

The SCTLA lawyers joined together for the purpose of expressing their views in a dramatic and forceful manner that no one of them could achieve individually. Yet it is precisely because the lawyers acted collectively that their conduct is being challenged as an antitrust violation. *See* 107 F.T.C. at 577. In analogous circumstances, this Court has consistently held that enforcement actions directed at group advocacy must be closely scrutinized to ensure that the participants' right to band together to "make their views heard on public issues" is not unnecessarily infringed. *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 295 (1981).

Group association is protected "because it enhances 'effective advocacy.'" *Buckley* v. *Valeo*, 424 U.S. 1, 65 (1976) (quoting *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)). As the Court explained in *Citizens Against Rent Control*, *supra*, "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." 454 U.S. at 294. The right of association enables individuals with shared interests to pool their resources to assert their views "as effectively and economically as practicable." *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 580 (1971); *see Meyer* v. *Grant*, 108 S. Ct. 1886, 1893 (1988).

Boycotts in particular have been recognized as "a staple of political, as well as economic, activity." *Costello Publishing Co.* v. *Rozelle* , 670 F.2d 1035, 1050 (D.C. Cir. 1981). As the court of appeals observed, boycotts "have historically been used as a dramatic means of communicating anger or disapproval and of mobilizing sympathy for the boycotters' cause." 856 F.2d at 248. To be sure, a boycott—in addition to enhancing the effectiveness of advocacy—may increase the threat of harm to competition. But that fact goes to the *weight* of the government's interest in forbidding the boycott and is not a reason for foregoing any and all First Amendment balancing. *See, e.g., United States* v. *National*

Society of Professional Engineers, 555 F.2d 978, 984 (D.C. Cir. 1977) (striking down portion of antitrust decree on First Amendment grounds, because "more intrusive than necessary to achieve fulfillment of the governmental interest" in preventing future violations), *aff'd on other grounds*, 435 U.S. 679 (1978).

In this case, collective action was the only effective means available for the SCTLA's members to mobilize political support for a fee increase. By acting through their association, the lawyers were able to conserve financial resources while maximizing their ability to draw public and media attention to the reimbursement issue. Indeed, disinterested observers suggested to the SCTLA's leadership that collective action was the lawyers' only hope for obtaining a political result. 107 F.T.C. at 536. Moreover, by taking the concededly drastic step of withdrawing their services from the program, the lawyers were able to bring the issue to the attention of policymakers who had previously disregarded it. Because the SCTLA lawyers faced strong political, as well as economic, incentives to engage in the boycott, their "strike" is entitled to the same measure of protection generally accorded to group efforts to persuade.

C. The SCTLA's Activities Represented A Genuine Attempt to Influence Governmental Action.

The extent to which political versus commercial motivations propelled the boycott is a matter of vigorous dispute between the parties. *See* 107 F.T.C. at 586-88. Regardless of the underlying motivations, however, there can be no serious question that the one indispensable goal of the boycott was to secure the passage of legislation increasing the CJA reimbursement rate.[6] Because the boycott represented a genuine attempt to influence governmental action, the First Amendment mandates that the antitrust laws be applied—if at all—with extreme caution.

[6] *See* 856 F.2d at 242. Because the District's CJA rates are set by statute, the strikers simply "could not gain economically in the absence of favorable legislation." Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 116 (1985) [hereinafter "*Abuse of Governmental Processes*"] (citing this factor as one reason for affording First Amendment protection).

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a group of trucking companies sued a group of railroad companies and their public relations firm alleging that they had conspired to restrain trade in the business of long-distance freight hauling. The truckers maintained that the railroad companies had engaged the public relations firm to conduct a publicity campaign designed to "foster the adoption . . . of laws . . . destructive of the trucking business" and "create an atmosphere of distaste for the truckers among the general public." *Id.* at 129. The Court held that the Sherman Act did not prohibit this conduct, regardless of its anticompetitive purposes or effects. In so holding, the Court emphatically rejected the contention that the railroads' economic interest in conducting the campaign affected the scope of their petitioning rights:

> It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Id. at 139; *see also United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

Noerr suggests that the SCTLA's activities may be entirely exempt from antitrust prosecution. Like the railroads in *Noerr*, the SCTLA's members joined together for the express purpose of

securing legislation. Moreover, like the railroads, the SCTLA did not confine itself to simple lobbying, but engaged in a broader effort to publicize its views and persuade the public to support them. The mere fact that the legislation would be economically advantageous to the members of the SCTLA does not preclude constitutional protection for their conduct. On the contrary, *Noerr* recognizes that economic self-interest may provide a powerful incentive for like-minded persons to gather and disseminate the essential "information upon which governments must act."

Noerr, however, does not directly address the situation presented in this case. As the Commission noted in its opinion, "[i]n the usual case in which the *Noerr-Pennington* doctrine has been held to apply, the government has played the role of an independent decision maker who is not a participant in the marketplace. . . . Here, the government is itself a player in the relevant line of commerce. . . ." 107 F.T.C. at 596. Because the District government was acting as a purchaser as well as a policymaker, the possibility exists that the SCTLA boycott could have resulted in *direct* harm to competition, even apart from the District's ultimate decision to enact legislation increasing reimbursement rates.[7] In these circumstances, a categorical exemption from the antitrust laws may not be appropriate. *See* 1 P. Areeda and D. Turner, *Antitrust Law* ¶ 206 (1978).

This conclusion, however, does not imply that the governmental identity of the D.C. Council is, as the Commission concludes, irrelevant. 107 F.T.C. at 596. At a minimum, *Noerr* requires that the government's interest in pursuing an antitrust action against genuine efforts to influence a governmental purchasing decision, and the government's means of furthering that interest, be closely

[7]As explained in part II, *infra*, it cannot be determined whether the SCTLA's activities resulted in any harm to competition prior to assessing the market power of the boycott participants.

scrutinized to insure against unnecessary encroachments of First Amendment freedoms.[8]

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In short, the SCTLA's activities were "sufficiently imbued with elements of communication" to fall within the scope of the First Amendment. *Spence*, *supra*, 418 U.S. at 409; *Texas* v. *Johnson*, *supra*, 57 U.S.L.W. at 4772. Viewed in context, the boycott was designed not merely to benefit the participants, but to galvanize public support for an important policy initiative. Expression of this nature, whether in the form of speech or conduct, is at the heart of the First Amendment's protection.

Plainly a civil action enjoining this conduct constitutes a direct and significant infringement of the SCTLA's First Amendment rights. Accordingly, the Court must determine whether, as the Commission concludes, an expressive boycott may be suppressed without regard for its actual competitive consequences.

II. THE MARKET POWER OF THE PARTICIPANTS IN AN EXPRESSIVE BOYCOTT MUST BE ASSESSED TO AVOID PENALIZING PROTECTED CONDUCT THAT MAY NOT BE HARMFUL TO COMPETITION.

The court of appeals showed enormous deference to the policies of the antitrust laws and the powers of antitrust enforcers. Despite having found that the SCTLA boycott "served, in part, to make a statement on a matter of public debate," 856 F.2d at 250, the court held that the boycott could be prohibited if its demonstrated economic effect was to suppress competition. The

[8]This is particularly true where, as here, the government's purchasing decision involves a significant policy determination. *Cf. George Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). Unlike, for example, the purchase of office supplies or "a technical decision about the best kind of weld to use in a swimming pool gutter," *id.*, the setting of CJA reimbursement rates involves fundamental questions of public policy. *See* pp. 11-12, *supra*.

court merely required the Commission to prove, rather than to presume, competitive harm. *Id.* That accommodation of the relevant interests was clearly appropriate, both as a matter of antitrust and First Amendment principles.

1. Under ordinary antitrust principles, the SCTLA's activities should be examined under the rule of reason rather than a *per se* rule. *Per se* rules are to be invoked only "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA* v. *Board of Regents of the University of Oklahoma,* 468 U.S. 85, 103-04 (1984). "Only when there is very little loss to society from banning a restraint altogether is an inquiry into its costs in the individual case considered to be unnecessary." *Jefferson Parish Hospital Dist. No. 2* v. *Hyde,* 466 U.S. 2, 33-34 (1984) (O'Connor, J., concurring).

The Commission had no basis in the record to conclude with confidence that the SCTLA's conduct was inherently anticompetitive. Just as the communicative elements of the boycott entitle the SCTLA lawyers to the protections of the First Amendment, so does the informational value of their message raise the prospect of procompetitive benefits. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 765 (1976). In this respect, constitutional and antitrust law are in complete agreement.

Like private purchasers of a service, governments require information in order to establish a price that permits them to obtain the mix of service characteristics (primarily price, supply, and quality) that they desire. Setting the price at too high a level causes waste of economic resources; setting it too low may reduce the amount and quality of services provided. Information from suppliers may enable the purchaser to attain the optimal balance.

To be sure, the information that a purchaser needs to receive from its suppliers can generally be conveyed through means less

drastic than a boycott. But for governments, and perhaps some private purchasers as well, evidence of public reaction to the consequences of alternative pricing strategies may itself be essential information to consider in setting a price. As representatives of the people, governmental officials necessarily shape their purchasing objectives upon information concerning what their constituents want. A dramatic appeal for public and media attention may provide significant information regarding the public's desires. Thus, the SCTLA boycott may have performed the procompetitive function of apprising District officials that—contrary to their apparent assumption—the citizenry of the District supported, or at least did not oppose, a rate increase.[9]

By generating information regarding both the problems caused by underfunding of the CJA program and the public's response to those problems, the SCTLA boycott may have enabled the District to make needed adjustments in its price and purchasing requirements—to the benefit not only of the SCTLA lawyers and their clients, but the general public as well. In any event, the informational value of the SCTLA's activities raises a sufficient prospect of procompetitive benefits to render *per se* treatment inappropriate.[10]

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[9]Respondent Perrotta's testimony before the administrative law judge illustrates the point:

> [F]or all that the Mayor knew in advance, the [public] reaction might well have been, we have serious budget problems, why are you giving money to a bunch of lawyers who are already making $20 an hour? That is twice as much as anyone else makes, of working people in the city. The reaction might have been the crime rate is already so enormous. . . . There might have been all kinds of reactions. And it was clear with the focal point of the strike that that was not going to be the reaction and, consequently, [it was] like political theatre in a sense. . . . [W]e never got an unkind word from anybody after the strike.

(J.A. 186-87).

[10]*See Osborn* v. *Pennsylvania-Delaware Service Station Dealers Ass'n,* 499 F. Supp. 553, 558 (D. Del. 1980) (applying rule of reason because

(Footnote continued on following page)

2. Even if antitrust principles considered in isolation supported application of a *per se* rule, the First Amendment implications of the SCTLA boycott would preclude a summary approach. In this regard, the logic of the court of appeals' analysis is unquestionably correct.

Once it is determined that particular conduct is entitled to First Amendment protection, *O'Brien* requires that any restrictions on the conduct be "no greater than is essential" to the furtherance of a substantial government interest. *O'Brien*, 391 U.S. at 377. The substantiality of the governmental interest in preserving freedom of competition cannot seriously be questioned. This Court has observed that the antitrust laws are "as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110-11 (1980) (citing *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)). Thus, under the *O'Brien* test, an expressive boycott proven to result in significant competitive harm could be prohibited, notwithstanding its communicative value.

As the court of appeals explained, however, determining whether expressive conduct has any actual capacity to harm com-

(Footnote continued from previous page)
expressive boycotts "are likely to follow other patterns and have other effects than more conventional forms of joint refusals to deal").

The court of appeals appeared to assume that, absent some degree of economic integration among the boycott participants, the boycott must be viewed as a "naked" restraint. 856 F.2d at 236. But courts have often recognized that horizontal competitors may combine to produce information that enhances the ability of the market to function in an efficient manner—even though (1) the information-producing activity can be characterized in some sense as a "boycott," and (2) the competitors have *not* integrated their economic operations. *See, e.g., Clamp-All Corp.* v. *Cast Iron Soil Pipe Institute*, 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 789 (1989); *Consolidated Metal Products, Inc.* v. *American Petroleum Institute*, 846 F.2d 284 (5th Cir. 1988).

petition requires an inquiry into market power.[11] Without such an inquiry, it is impossible to know whether the governmental interest in preserving free trade is even implicated.[12] Although application of a *per se* rule may serve a secondary governmental interest in administrative convenience, that interest does not justify the suppression of expressive activity with indeterminate competitive effects. Accordingly, the Commission's failure to measure the market power of the boycott participants violates *O'Brien*'s admonition against restrictions that are not supported by a substantial governmental interest.

Viewed from a slightly different perspective, the Commission's *per se* approach runs afoul of a separate branch of the *O'Brien* test: the requirement that regulations of expressive conduct be narrowly tailored to the relevant governmental interest.[13] As this Court has explained, a regulation

> is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.

Frisby v. *Schultz*, 108 S. Ct. 2495, 2502-03 (1988) (citations omitted). An expressive boycott with predominantly procompetitive or competitively neutral effects is not "an appropriately targeted evil." *Id.* Because the Commission's approach would indiscriminately sweep such activity within the same proscription as conduct that is demonstrably anticompetitive, it fails to provide the

[11] 856 F.2d at 249; *see also Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (market power "is a prerequisite to being able to restrain trade unreasonably").

[12] *Cf. Texas* v. *Johnson*, *supra*, 57 U.S.L.W. at 4773 (government interest in preventing breach of peace not implicated by public flag burning as part of political protest, where record showed no actual threat of disturbance occurring).

[13] This Court has stated that *O'Brien*'s "no greater than is essential" formulation is equivalent to a "narrowly tailored" standard. *Board of Trustees* v. *Fox*, 57 U.S.L.W. 5015, 5018 & n.3 (June 27, 1989); *see also Community for Creative Non-Violence*, *supra*, 468 U.S. at 298.

"precision of regulation" that the First Amendment commands. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

a. The Commission's brief argues, apparently for the first time, that the *O'Brien* test is not applicable because *Claiborne* and *Noerr* exhaust the First Amendment's concern for expressive conduct that may adversely affect competition. FTC Br. at 25-28. But nothing in either *Claiborne* or *Noerr* precludes an intermediate level of scrutiny for conduct that does not fall within the specific parameters of the exemptions set forth in those decisions. Indeed, *Claiborne* recognized the applicability of the *O'Brien* test to expressive boycotts, 458 U.S. at 912 & n.47, as have other courts and commentators that have considered the issue.[14]

Rather than constituting a "novel and untenable exception," FTC Br. at 11, a requirement that competitive harm be demonstrated by exacting proof represents a logical application of established First Amendment principles. In diverse areas of substantive law, this Court has held that the First Amendment may require heightened proof of the elements of a legal violation before expression may be penalized. In *Claiborne*, for example, the Court held that the presence of expressive conduct "imposes restraints on the grounds that may give rise to [tort] damages liability and on the persons who may be held accountable for those damages." 458 U.S. at 916-17; *see also Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973) (seizures of allegedly obscene books or films must meet higher standard of Fourth Amendment reasonableness than seizures of non-expressive contraband); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (heightened evidentiary showing required in libel actions involving public officials). Similarly, when a court in an antitrust case is faced with ambiguous evi-

[14]*See, e.g., Osborn*, *supra*, 499 F. Supp. at 557; Note, *A Market Power Test for Noncommercial Boycotts*, 93 Yale L.J. 523, 532 & n.52 (1984) [hereinafter *"A Market Power Test"*]; Comment, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131, 1144 (1980); Note, *Political Boycott Activity and the First Amendment*, 91 Harv. L. Rev. 659, 671 (1978) [hereinafter *"Political Boycott Activity"*].

dence of conspiracy, the First Amendment may require a clearer showing of actual agreement than would otherwise be required.[15]

In each of these situations, heightened evidentiary burdens serve the function of guarding against insufficiently justified infringements of expressive rights. The market power requirement, as articulated by the court of appeals, does this and nothing more.

b. The Commission contends that a market power requirement would significantly impair its enforcement program. But as the Commission itself notes, expressive boycotts have been "infrequent." FTC Br. at 33. In light of the paucity of cases, the Commission's protestation that a market power requirement would impose onerous new administrative burdens must be viewed with skepticism.

The Commission attempts to explain away the infrequency of expressive boycotts with the observation that "most people have considered them illegal *per se*." FTC Br. at 33. This assertion lacks any evidentiary or legal support, however. The only "cases" cited by the Commission are FTC consent agreements, each of which was entered without any adjudication of the merits, and each of which expressly disavows any admission of liability—much less *per se* liability.[16] At least so far as the courts have been concerned, rule of reason rather than *per se* treatment has been

[15]*See Market Power Test*, *supra*, 93 Yale L.J. at 525; *Political Boycott Activity*, *supra*, 91 Harv. L. Rev. at 689. Indeed, the administrative law judge below appeared to recognize this principle in rejecting complaint counsel's suggestion that the mere discussion at SCTLA meetings of appropriate fee levels to be included in proposed legislation constituted an illegal conspiracy. 107 F.T.C. at 554 n.218.

[16]FTC Br. at 33 & n.28. The Commission is no doubt correct, however, in its assumption that if a *per se* rule *were* established, it would have a substantial deterrent effect upon collective efforts to convey an opinion on issues having mixed political and economic implications. Indeed, a *per se* rule would raise the specter of criminal prosecutions under the Sherman Act for joint *political* activities by competitors.

the nearly universal mode of analysis for boycotts with an expressive component. *See, e.g., United States* v. *North Dakota Hospital Association,* 640 F. Supp. 1028 (D. N.D. 1986); *Osborn, supra,* 499 F. Supp. 553. The Commission itself saw fit to apply the rule of reason in *In re Michigan State Medical Society,* 101 F.T.C. 191 (1983). Thus, a more plausible explanation for the scarcity of case law in this area is that antitrust enforcers, in the exercise of sound discretion, have generally opted to stay out of the political arena. *See Political Boycott Activity, supra,* 91 Harv. L. Rev. at 678-79.[17]

3. The Commission contends that, even if a *per se* rule is not applied, it should not be required to prove market power because adverse competitive effects are demonstrated by the mere fact of the rate increase. Relying upon *FTC* v. *Indiana Federation of Dentists,* 476 U.S. 447, 460-61 (1986), the Commission notes that "'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)).

As the court of appeals explained, however, "[t]he normal assumptions regarding cause and effect in an economic market cannot be transplanted wholesale into the political arena." 856 F.2d

[17]The Commission suggests that a market power requirement for expressive boycotts would open the floodgates to boycotts of Medicaid by health care providers. FTC Br. at 33-35, 43. The Commission's concerns are totally unwarranted, however. In addition to the fact that such boycotts have rarely occurred, *id.* at 33, a market power requirement fully protects the Commission's legitimate interests in policing competition. The Commission's argument simply begs the question whether expressive boycotts are, in all cases, damaging to competition. If they are not, then the prospect (unlikely in our view) of an increased number of such boycotts occurring in the future cannot justify *per se* treatment. Notably, the AMA counsels its members and state and local medical societies to avoid activities that could be characterized as a collective refusal to deal with governmental or private payors. *See, e.g.,* American Medical Association, *Collective Negotiation and Antitrust: A Guide for Physicians* (1989).

at 251. Given the political context in which the boycott occurred, political rather than economic power may be the "more explanatory variable" for the increase in CJA rates. *Id.* Indeed, the record shows that the SCTLA boycott was met with considerable sympathy by non-CJA lawyers, the media, and the public at large. It is therefore quite plausible that the SCTLA's efforts succeeded because District officials, acting in accordance with the perceived will of their constituents, decided to improve the amount or quality of services provided under the CJA program.[18]

One thing is certain, however: If the boycott participants lacked market power they could not have exerted any significant economic pressure on the District to increase reimbursement rates. The conclusion would then be inescapable that the increase was the product of "the rough and tumble of municipal politics," 856 F.2d at 252, rather than economic coercion. As such, the boycott could not be suppressed consistent with either *O'Brien* or *Noerr.* It is therefore essential that the Commission assess the lawyers' market power before pronouncing their conduct anticompetitive.

Moreover, if on remand the Commission determines that the lawyers had market power, its inquiry should not end. The Commission still must decide whether that power was significant enough to justify the suppression of their expressive activities. 856 F.2d at 252-53. Because the First Amendment requires exacting proof that an expressive boycott in fact harmed competition, the SCTLA's activities should not be condemned unless any market power that the lawyers possessed was sufficient to cause serious competitive injury. In addition, the SCTLA still must have an

[18]Alternatively, the District may have made a political choice to provide CJA lawyers with a better standard of living and higher professional standing than would otherwise be available to them. Such a choice would undoubtedly be within the District's powers. *See Parker* v. *Brown,* 317 U.S. 341 (1943). When the market provides certain economic actors a return far below the perceived social value of their services, it is not unusual for legislation to attempt to fill the gap.

opportunity to demonstrate that the increase in rates resulted from persuasion, for "[t]he fact that market conditions may favor" the exercise of market power "does not imply that a boycott constitutes unlawful economic coercion rather than bona fide political expression." Hurwitz, *supra*, *Abuse of Governmental Processes*, 74 Geo. L.J. at 115.

Finally, given the possible procompetitive benefits of the SCTLA's activities, the Commission should consider on remand whether such benefits outweighed any adverse competitive effects. In making this analysis, the Commission should take into account the informational value of the boycott. *See* pp. 18-19, *supra*. The Commission must not simply assume—as it does now—that "payment of a higher legal service price" constitutes an "adverse effect of the boycott." FTC Br. at 44. If the District, based on the information generated by the boycott, chose to purchase a higher quantity or quality of CJA services, an increase in expenditures would not represent an adverse competitive effect. *See* R. Bork, *The Antitrust Paradox* 296 (1978). On the contrary, such an increase would epitomize the working of competition to facilitate choice and maximize consumer welfare.

In sum, the First Amendment requires at a minimum that an expressive boycott not be condemned under the antitrust laws absent rigorous proof of a violation. Here, the Commission failed to demonstrate the most fundamental element of a Sherman Act §1 violation, that of competitive harm. The court of appeals therefore correctly held that the Commission had not met its burden.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AMICUS CURIAE

BRIEF

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Nos. 88-1198 and 88-1323

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS/ CROSS-PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") has obtained the written consent of the parties to file this brief, and has filed consent letters with the Court.

The NACDL is a non-profit corporation with a nationwide membership of more than 5,000 lawyers. It is concerned with the protection of individual rights, with reform of criminal law practice and procedure, and with improvement of the conditions under which criminal law practitioners must work, particularly those practitioners who provide counsel to indigent defendants, whether as public defenders or as court-appointed lawyers. The NACDL supports the efforts of underpaid court-appointed counsel, such as the respondents/cross-petitioners in this case, to increase their statutory fees and fee limits.

SUMMARY OF ARGUMENT

Local governments use a variety of methods to fulfill their constitutional mandate to provide free legal counsel to indigent criminal defendants. The District of Columbia used both a Public Defender Service and appointed private counsel to meet this obligation. Only a small proportion of those eligible for appointment to criminal cases in the District of Columbia actually volunteered for them. Although the trial court had authority to appoint attorneys from a much larger segment of the bar than that represented by the respondents/cross petitioners, it relied only upon those who volunteered to accept cases.

Because lawyers do not have the power to refuse to accept criminal cases when appointed to represent indigents, and because refusal to accept such appointments may be punishable as contempt, the court, and not the respondents, had complete control over the supply of attorneys available to represent indigent defendants. Since they could not have refused to accept any cases when appointed, the function of the respondents' "boycott" was purely to communicate the lawyers' distress over the level of statutory fees and its effect on the quality of legal representation offered to indigents.

While the effect of the respondents' boycott, an increase in statutory fees, was anti-competitive, their otherwise lawful efforts to achieve that effect are protected under any reading of the *Noerr-Pennington* doctrine.

ARGUMENT OF LAW

I. Federal Anti-Trust Legislation Does Not Reach the Respondents' Conduct

The Court must here determine whether the Sherman Act[1] and the First Amendment[2] permit the federal government to punish a group of lawyers who, as part of an effort to win passage of legislation which would increase fees paid to appointed criminal defense counsel, noisily stopped their voluntary acceptance of appointed cases. The court of appeals held that the Sherman Act applies to the lawyers' behavior, but found that the First Amendment prohibits government sanctions against the lawyers, absent a showing that the lawyers have economic power in the relevant market. *Superior Court Trial Lawyers Association v. Federal Trade Commission*, 856 F.2d 226 (D.C. Cir. 1988) ("*S.C.T.L.A.*"). We believe that the lawyers' conduct was not coercive but rather was persuasive, and that its essentially communicative aspect shielded it, under the First Amendment, from government reprisal.

A. The District of Columbia Required Only Those Lawyers Who Volunteered to Do So to Accept Appointments to Criminal Cases

Every jurisdiction in the United States must provide, at government expense, counsel to criminal defendants who are unable to raise enough funds to pay for an attorney by their own devices.[3] State and local governments use a variety of methods to fill this prescription, none without

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[1] 15 U.S.C. 1.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[3] See, e.g., *United States v. Cronic*, 466 U.S. 618 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

cost to taxpayers or the bar. The D.C. government uses a hybrid system. It combines salaried public defenders, who are city employees, with appointed private counsel, sometimes known as "Fifth Streeters,"[4] who are, typically, solo practitioners working from their homes or from part-time offices without secretarial assistance, and who derive nearly all of their income from statutory fees earned in appointed criminal cases.[5]

Not surprisingly, few lawyers are willing to lead the sort of marginal professional existence eked out by the Fifth Streeters. At the time of the boycott, only about 1,200 lawyers had registered for appointed criminal cases. Pet. App. 4a. Most appointed cases, however, were apportioned among an even smaller group of approximately one hundred lawyers. *Id.* To be assigned a case on a given day, an attorney must not only have pre-registered, but must also have telephoned the CJA office of the D.C. Public Defender Service between 7:45 and 8:15 a.m., indicating a willingness to accept a new case that day. *S.C.T.L.A.*, 856 F.2d at 228. Apparently, only a small proportion of even those attorneys who had registered regularly volunteered for appointments in this fashion.

In 1982, the year before the Fifth Streeters' boycott, appointed counsel handled some 19,475 misdemeanor cases and 4,000 felony cases.[6] Pet. App. 157a. For a time, this overwhelming reliance on volunteer appointed counsel was satisfactory to nearly all concerned. It satisfied the Fifth Streeters, by providing them with ample legal work. It

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[4]The tag, "Fifth Streeter," refers to the location of the Superior Court and of the offices of some of the attorneys who voluntarily accept appointment to criminal cases. More importantly, it distinguishes that segment of the bar who regularly represent criminal defendants in Superior Court from more prosperous "uptown lawyers," many of whom have offices on streets connected to Connecticut Avenue. Pet. App. 140a, n. 2.

[5]The four named respondents/cross-petitioners all answered to this description. Pet. App. 148a-151a.

[6]This amounted to eighty-five percent of all indigency cases. Pet. App. 157a.

satisfied the City Council and its constituent taxpayers, by providing ever-unpopular-to-pay-for indigent defense services at bargain basement prices.[7] It satisfied the bench, by providing self-propelled, low-maintenance machinery which matched the names of appointed-lawyers-to-be with the names of indigent criminal defendants. Perhaps it also satisfied some of the uptown lawyers, by providing relief from the likely unpleasant and unremunerative obligation to provide legal assistance to indigent criminal defendants.[8]

B. The Respondents Lacked the Power to Affect the Supply of Indigent Criminal Defense Lawyers

This method was not the only one available to the D.C. Superior Court to provide counsel to indigent defendants. It

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[7]The 1982 payments to appointed counsel in D.C. totaled $4,579,572. Pet. App. 157a. The appropriation to the Public Defender Service ("P.D.S."), which handled only about eight to ten per cent of all indigent cases, was $3,306,000. *Id.* This disparity may be partly attributable to the P.D.S. practice of handling mostly serious and complex cases, but the figures also suggest that appointed criminal defense counsel in D.C. worked cheaply. As early as 1975, the blue-ribbon Austern-Reneck committee, working under the auspices of the Judicial Conference of the D.C. Circuit and the D.C. Bar, extensively studied indigency practice in the District, and concluded that rates paid to appointed defense attorneys were too low and that they must be increased to ensure effective representation and adequate compensation to counsel. Pet. App. 170a-173a.

[8]See, e.g., ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function* §1.5 (1971): "The bar should encourage through every available means the widest possible participation in the defense of criminal cases by experienced trial lawyers. Lawyers active in general trial practice should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel"; ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *Providing Defense Services* §2.2 (1968): "Assignments [to appointed criminal cases] should be distributed as widely as possible among the qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made".

had the manifest power to require all members of the D.C. bar, or all practicing trial lawyers, or all practicing criminal defense lawyers, or even the 1,200 registered lawyers, to shoulder a share of the burden. The duty of a trial court to appoint counsel to represent indigent defendants charged with serious crimes is clear, and its power to do so, even in the absence of a statute, cannot be questioned. *Powell v. Alabama*, 287 U.S. 45, 73 (1932). "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Id.* Courts have consistently upheld their power to appoint counsel to involuntarily represent indigent defendants, even without compensation.[9]

Under this plenary authority, the D.C. Superior Court could have chosen, at any time, to expand the pool of attorneys from which appointments were made, and it could have required those in the pool, whether expanded or not, to accept cases. Instead, it chose to meet its recurring need for appointed counsel by assigning cases only to those lawyers who picked up the telephone and asked for them.

C. The Respondents' Conduct Was Purely Communicative

When the Fifth Streeters collectively stopped picking up the telephone, they did not and could not have relieved themselves of the obligation to represent any defendants that the court may have ordered them to assist. As mem-

[9]See, e.g., *Waters v. Kemp*, 845 F. 2d 260, 263 (11th Cir. 1988) ("As an officer of the court, a lawyer has a fundamental duty to perform services pro bono for indigents when called upon by the court.... An attorney may be relieved of his duty to accept a court appointment only when the appointment is likely to impede the due administration of justice"); *United States v. Acceturo*, 842 F. 2d 1408, 1412 (3rd Cir. 1988); *Williamson v. Vardeman*, 674 F. 2d 1211, 1214 (8th Cir. 1982); *United States v. Dillon*, 346 F. 2d 633, 635 (9th Cir. 1965), *cert. denied* 382 U.S. 978 (1966) ("A lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order"); *In Re Frankel*, 293 A. 2d 196 (N. J. 1972), *cert. denied* 409 U.S. 1125 (1973); *In Re Meizlish*, 196 N. W. 2d 129 (Mich. 1972); *People v. Hutchinson*, 195 N. W. 2d 787 (Mich. App. 1972).

bers of the bar, they shared that obligation with all their colleagues. Putting the proposition another way, the Fifth Streeters, as lawyers, lacked the power to refuse to accept new appointments.[10] Their collective act was merely a message, albeit a dramatic one, to the court and to the community. The message was, in essence, that the lawyers were being inadequately compensated and that their clients were being inadequately represented under the existing system.[11] Therefore, the lawyers said, we want it known that we no longer desire to take part in it.

This is far different from the F.T.C.'s characterization of their conduct (also cited in the petitioner's brief at 41) as having "dramatically reduced the supply of lawyers to the city's CJA program," "adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants," and "forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [lawyers]." Pet. App. 96a. The F.T.C. is wrong. As a matter of law, the D.C. Superior Court, and not the lawyers admitted to its bar, controlled and still controls the supply of lawyers to the CJA program.

Unlike the lawyers writing title insurance policies for collectively-fixed prices in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), lawyers appointed to indigent defense cases lack the ability to withhold their services if their

[10]This is notwithstanding the written petition signed by a number of attorneys which stated, "[U]nless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act." *S.C.T.L.A.*, 856 F. 2d at 230. Apparently, none of the boycotting attorneys were appointed to cases by the court while the boycott was in progress, so the collective "refusal" to accept new cases was never tested. Under the authority cited in n. 10, *supra*, any such refusal would have been punishable under the trial court's contempt power.

[11] Even the F.T.C., in its opinion, conceded that "[W]e have no reason to doubt that the respondents are indeed concerned about Sixth Amendment rights," Pet. App. 106a, and "[W]e do not question the respondents' genuine concern for their clients", Pet. App. 110a, before finding that the lawyers' motivation was primarily commercial, and not political.

desired price is not met. A threat to do so cannot be carried out, at least without running afoul of a trial court's contempt power.[12] The actual function of such a threat is to communicate that the lawyers are upset. The Fifth Streeters had no coercive power, and no ability to fix prices at all. They could rely only on their ability to communicate and persuade.[13]

D. The Anti-Competitive Goal of the Respondents Was Not Subject to Anti-Trust Sanctions

[12]Alternatively, the court could require acceptance of appointed cases as a condition for admission to practice before it. See *United States v. Dillon*, *supra*, n. 10.

[13]To the extent the lawyers formed a professional judgment, whether individually or collectively, that their clients were receiving inadequate representation because of the low level of compensation paid to appointed counsel — the F.T.C. does not seriously dispute that this happened, see n. 12, *supra*, while the 1975 report of the Austern-Reznick committee tends to support such a conclusion, see n. 8, *supra*— then surely they had a professional and ethical obligation, and a responsibility to the justice system, to remedy the situation if they could. It is difficult to imagine what additional steps they might have taken short of a boycott. Enlist the aid of the local bar association? They tried that. The D.C. bar passed a resolution calling for a rate increase. Pet. App. 178a. Shortly afterward, a bill providing for a rate increase was introduced in the D.C. City Council, but it died in committee. Pet. App. 178a-179a. Ask the Superior Court's Chief Judge for help? They tried that. He declined because his court might have to consider the legality of any bill passed by the City Council. Pet. App. 179a. Lobby the Mayor's office? They tried that. They were told they needed the Chief Judge's support if the legislation was to get the Mayor's support. Pet. App. 180a. Ask the Chief Judge for help again? They tried that, repeatedly. He always declined. *Id.* Lobby the City Council? They tried that. A hearing was held, the lawyers' fee increase stood unopposed on the merits, and the lawyers were told that no one in the city government opposed their demand, but no funds were appropriated for the increase. Pet. App. 182a-183a. Buttonhole the Mayor? They tried that. He was sympathetic but could provide no source of additional funds. Pet. App. 183a-184a. Threaten to boycott? They tried that. The result was unproductive. Pet. App. 186a-187a.

The *Noerr-Pennington* doctrine,[14] widely discussed in the Administrative Law Judge's findings, the F.T.C.'s opinion, the court of appeal's opinion, the F.T.C.'s brief, and, no doubt, in the briefs of the respondents/cross-petitioners and their other supporting *amici*, immunizes from anti-trust sanctions otherwise lawful attempts by business competitors to communicate with and persuade public officials to adopt legislation or government policy. This is is so even when the sought-after government action would have an anti-competitive effect,[15] and even when the communications used are deceptive to the public.[16]

Even following the restrictive interpretation of *Noerr-Pennington* urged by the F.T.C., see Petitioner's Brief at 14, federal anti-trust law fails to reach the publicized boycott initiated by the respondents in order to induce the D.C. City Council to raise their statutory fees. Because their conduct had no effect on the supply of attorneys eligible for appointment to criminal cases, the boycott itself was not violative of federal anti-trust law. While the lawyers' goal was to enact anti-competitive legislation, under the *Noerr-Pennington* doctrine this did not subject the lawyers to further anti-trust liability.

CONCLUSION

The judgment of the court of appeals should be vacated and the matter remanded with instructions to direct the Federal Trade Commission to dismiss its charges against the respondents.

[14]*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

[15]*Noerr*, 365 U.S. at 136; *Pennington*, 381 U.S. at 670.

[16]*Noerr*, 365 U.S. at 140. Even if the *Noerr-Pennington* doctrine does not protect the lawyers' boycott, as the court of appeals found, the lawyers' lack of coercive power affecting the supply of CJA lawyers to the Superior Court would demonstrate a lack of economic power in the relevant market. Therefore, the analysis employed by the court of appeals also compels dismissal of the F.T.C.'s charges.

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL TRADE COMMISSION,
Petitioner,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
RALPH J. PERROTTA,
KAREN E. KOSKOFF,
REGINALD G. ADDISON,
JOANNE D. SLAIGHT,
Respondents.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS/PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1198, 88-1393

FEDERAL TRADE COMMISSION,
Petitioner,
v.
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
RALPH J. PERROTTA,
KAREN E. KOSKOFF,
REGINALD G. ADDISON,
JOANNE D. SLAIGHT,
Respondents.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,
v.
FEDERAL TRADE COMMISSION

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS/PETITIONERS

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan membership organization dedicated to promoting the principles embodied in the Bill of Rights. The ACLU of the National Capital Area is its local affiliate in Washington, D.C.

This case involves two issues that are central to the ACLU's organizational interests: the right to petition the government for a redress of grievances and the right of indigent defendants to meaningful representation. The ACLU has often appeared before this Court on both of these issues both as direct counsel and as *amicus curiae*.

SUMMARY OF ARGUMENT

The Sherman Act was intended to apply to combined action in commercial markets, not activity directed to influencing legislatures. Boycotts which are solely directed to influencing the passage of legislation are only one of a number of joint activities used to generate support for legislation. As such, they should be immunized from antitrust prohibitions to the same extent as combined lobbying, advertising, public relations, and campaign funding activities which are frequently employed to pressure legislatures. A legislative boycott can be effective only if it succeeds (often coupled with other efforts) in marshalling political support for its objectives. Legislatures, absent such support, can easily defeat a boycott's economic pressure by providing for alternatives to the withheld goods and services. Since legislative boycotts can play an important role in government petitioning, the Sherman Act should be interpreted not to apply to them to avoid serious First Amendment concerns.

In particular, a boycott which, as here, promotes the constitutional rights of otherwise unrepresented or powerless groups should be protected from the chilling application of antitrust law. There are elements in our society which are cut off from conventional political process, and can take effective political action only through withholding their services or patronage. A legislature or agency which applies an antitrust law to penalize such conduct prevents such persons or their representatives from engaging in the only form of political action realistically available to them.

The CJA lawyers were the only group who could in fact represent the interests of District of Columbia indigent defendants, and had exhausted all conventional political avenues prior to the boycott. The record leaves no doubt that the boycott succeeded because it focused public attention on the problem of effective representation and made it politically possible for the D.C. Government to address the issue, not because it coerced the Government economically. The record, as well as common sense, also leave little doubt that the CJA compensation levels, set in 1970 and subject to rampant inflation, were facially inadequate to support even a moderately complex criminal defense effort, and, at the very least, presented serious constitutional questions. That the boycott led to a partial remedy of this situation demonstrates its intrinsic political character, and the desirability of preserving such avenues of protest, free of the chilling prohibitions of commercial trade regulation.

The fact that the CJA lawyers were competitors in some very limited sense for court appointments at statutorily fixed compensation, and were economically self-motivated, provides no basis for applying the Sherman Act to their petitioning boycott. This Court has repeatedly recognized that economic motives are almost always intermingled with policy concerns in the political process, and that constitutionally protected rights of speech, assembly, and petition are not diluted merely by the presence of economic self-interest. Furthermore, the concerns of the antitrust laws to ensure free, unrestrained markets are only lightly implicated by petitioning boycotts representing otherwise powerless interests. Thus, where a boycott seeks to advance a fundamental right of an otherwise unrepresented group, it should be lawful under the trade regulation laws, whether or not the participants are competitors in the purchase or supply of goods, or services.

Finally, if the Court holds that the Sherman Act can be applied to the instant boycott, it should make it clear

that its holding does not extend to non-violent citizen boycotts seeking to raise constitutional or other policy issues, such as that involved in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Nothing in the record or argument of this case justifies departure in any respect from *Claiborne*'s holding that the Sherman Act was never intended to apply to collective citizen action in pursuit of political ends, and that such action, if otherwise lawful, is protected under the First Amendment.

ARGUMENT

I. THE SHERMAN ACT DOES NOT APPLY TO A BOYCOTT SOLELY DIRECTED TO SECURING LEGISLATION

The ACLU as Amicus supports those sections of the Respondent Association's and Individual Respondents' briefs which show convincingly, we believe, that the Sherman Act was never intended to apply to a boycott, the sole purpose of which, like the boycott here, is to obtain legislation. The Act was intended to apply to concerted commercial activities, not concerted activities directed to influencing the legislative process. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The essence of the *Noerr* line of cases is that joint activities which can be unlawful in the commercial realm fall outside the intendment of the Act when their purpose is to influence a legislature, either directly or by marshalling public opinion and generating political pressure.

The FTC and the Court of Appeals seek to place political boycotts within the ambit of the antitrust laws despite the fact that they are only one of a number of joint activities traditionally employed to "lobby" or influence legislators.[1] Both the Commission and the court below

[1] These can include joint advertising or public relations campaigns, organized lobbying of legislators, withholding of campaign contributions, and jointly sponsored litigation. *Noerr, id.* at 140-42.

were apparently moved by a misplaced fear that such boycotts might generate irresistible economic pressure on legislatures calculated to produce extreme social ills. These fears seem fanciful and contradicted by historical experience. Given the plenary power of a legislature to protect itself against economic pressure, it seems highly unlikely that such a boycott could succeed except by generating the political support which would lead to legislative success. A boycotting group that fails to generate effective *political* support for its position will inevitably succumb to the power of a legislature to enact alternative means of obtaining the withheld patronage, goods, or services. That is, economic pressure can be exerted against a legislature only in the context of a successful political campaign persuading it to acquiesce in the boycotter's demands. Otherwise, the lawmaking body will simply legislate around the boycott, and defeat its purpose.[2] Such a process not only does not carry the evils which the antitrust laws were designed to prevent, but serves as a useful energizing mechanism for marshalling and publicizing commonly held discontents.

The organized generation of political pressures is of the essence of democratic politics. "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." *Citizens Against Rent Control/*

[2] For example, a service boycott by so-called "Medicaid doctors" could be easily defeated by short term funding of alternative medical suppliers with the result of freezing the boycotting physicians out. Such a boycott could succeed only if the doctors succeeded in persuading a majority of the electorate to persuade a majority of the legislature that their cause was just. A legislature might of course elect to "buy peace" or make a nuisance settlement with a boycotting group even though it had not succeeded in obtaining majority political support. Such a possibility can not possibly justify the outlawry of all political boycotts, since the same concern could be expressed regarding any of the collective conduct immunized by *Noerr* and cases following it, and given the importance of such boycotts in the political process.

Coalition For Fair Housing v. Berkeley, 454 U.S. 290, 296 (1981). Since governments do not need protection against economic pressures, there is no reason to deny recourse to a boycott with economic consequences as a mechanism for publicizing grievances requiring legislative redress. Indeed, as we show in Part II below, boycotts may be the only effective political mechanism available to groups who have no access to other forms of organized political action.

It follows that the Sherman Act should be construed as inapplicable to a boycott seeking to influence legislation, since any other construction would interfere with an important and often effective mechanism of political expression.

II. A BOYCOTT SUCH AS THAT HERE INVOLVED WHICH HAS THE EFFECT OF PROMOTING CONSTITUTIONAL RIGHTS OF OTHERWISE UNREPRESENTED GROUPS OR PERSONS, OR WHICH CHALLENGES VIOLATIONS OF THOSE RIGHTS, SHOULD BE IMMUNIZED FROM THE ANTITRUST LAWS DESPITE THE FACT THAT IT MAY HAVE ECONOMIC EFFECTS WHICH WOULD OTHERWISE BE CONDEMNED BY THOSE LAWS

If the Sherman Act applies at all to a boycott solely intended to secure legislation (and we join with Respondents in urging that it does not), it should be construed as inapplicable to boycotts, such as that here involved, promoting the rights of otherwise unrepresented or powerless groups or persons to avoid substantial questions under the First Amendment. The instant boycott was an integral part of a political campaign to obtain public support for compensation at minimum levels capable of providing an effective defense for indigents, whose Sixth Amendment rights could be asserted only by the CJA lawyers and only through the medium of a boycott.

A. Boycotts By or On Behalf of Powerless or Otherwise Unrepresented Groups May Be the Only Effective Method of Advancing the Political Rights or Grievances of Such Groups, and Should Be Protected Under the First Amendment

This Court has recognized at least since *Stromberg v. California*, 283 U.S. 359, 369 (1931) that First Amendment rights are essential for the viability of a democratic society. It has repeatedly held that legislatures may not outlaw steps in the democratic political process by laws which, even if directed to otherwise permissible ends, interfere unduly with the free expression without which a democratic society cannot function. *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). This Court has also recognized that there are elements in society which are cut off from conventional political processes, and which as a practical matter cannot use established organizational techniques to advance their political interests. *NAACP v. Button*, 371 U.S. 415, 429-31 (1963); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("discrete and insular minorities").[3] The most effective, and often the only, method of political participation available to such groups or to those seeking to rep-

[3] This may result from a lack of education, political sophistication, or material assets, or because the members are handicapped by negative or biased majoritarian attitudes or subject to legal restrictions. Current examples of such groups could include certain racial minorities, recent immigrants, indigent criminal defendants, and members of unpopular religious groups. At times in the past, such groups may have included labor unionists, politically active women, Roman Catholics, and disfavored ethnic and racial minorities. See, *NOW or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 Colum. L. Rev. 1317, 1335, 1339 (1980); Friedman, *Consumer Boycotts in the United States, 1970-1980: Contemporary Events in Historical Perspective*, 19 Journal of Consumer Affairs 96 (1985); *Crown Central Petrol. Corp. v. Waldman*, 486 F. Supp. 759, 769 (M.D. Pa.), *rev. on other grounds*, 634 F.2d 127 (3d Cir. 1980).

resent their interests is a collective decision to act or refrain from acting in their capacity as consumers or workers. Typically, they do not have the individual or collective capacity to organize political parties, acquire media outlets, elect officeholders, or develop prosperous businesses. Often the only thing they can do to call attention to their views or grievances is to marshal their economic power, individually trivial but possibly potent collectively, by granting or withholding their services or patronage.

At times, as is the case with indigent defendants in criminal cases, such groups must rely on surrogates such as the CJA regulars to mount the protest which will identify and seek to rectify their grievances. Lawyers have both a unique capacity and responsibility to undertake the representation of such interests which are totally unable to represent themselves. A legislature or agency which applies an antitrust law, or any other law, to prohibit or penalize such conduct, otherwise peaceful and lawful in nature, prevents such persons or their representatives from engaging in the only form of political activity realistically available to them.[4]

It is not disputed that the antitrust laws were intended to apply to commercial conduct, and not political action. *Noerr, supra*, 365 U.S. at 135, 137 n.17. *See also Missouri v. National Organization for Women*, 620 F.2d 1301, 1315 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980);

[4] Collective activity in labor bargaining and withholding employment services (strikes) was once outlawed under the antitrust laws and state criminal law. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502-04 (1940). While this right has been limited for employees who have voluntarily chosen to work for the government, its otherwise protected status reflects legislative and judicial recognition that most individuals are powerless to assert their rights against employers if they cannot resort to their only weapon, collective withholding of their labor. *Apex Hosiery, id.*; *United States v. Hutcheson*, 312 U.S. 219, 232 (1941); Clayton Act § 20, 29 U.S.C. § 52.

Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 261 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982) (citing *Noerr*); *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982). Where, however, the boycott advances the constitutional rights of groups which have no other political recourse, it represents a form of political speech which deserves the highest degree of protection even where, as often the case, there is a negative economic impact on the target government or private interests. Otherwise, such groups will be disenfranchised since they or their representatives will be denied the freedom to exercise the only choice realistically within their power, collectively to deal or not deal with the government for their services or patronage.

B. The CJA Regulars Were in Pragmatic Terms the Only Group Who Could Represent the Interests of Indigent Defendants, and Had Exhausted All Other Political Appeals Prior to the Boycott

The CJA regulars were uniquely placed to evaluate the quality of legal services provided to indigent defendants under the District of Columbia CJA in the light of constitutional standards. Indigent defendants typically have few if any personal resources, or the ability to identify or act on legal or social issues. It would be difficult for any organization or group, other than the CJA lawyers, to represent them adequately in seeking effective assistance. The indigent defendant population is not a readily identifiable or static group that can organize. The pool of current indigent defendants is always changing as cases are disposed of and new cases brought. Defendants leaving the pool have little, if any, interest in the adequacy of representation of other indigent defendants. Future indigent defendants are impossible to identify, and, in any event, would be unlikely to come forward to express concerns about ineffective assistance issues.

The CJA lawyers' economic self-interest gave them a unique incentive to take effective action to address the constitutional implications for the right to effective counsel of inadequate compensation. These lawyers, however, were too few in number and otherwise not sufficiently empowered to mount an effective political campaign to increase the compensation level, apart from the boycott to which they ultimately resorted. The Respondents' briefs describe the prolonged and extensive effort made by these lawyers to obtain an adjustment in their compensation through conventional political processes, including attempts to elicit support from the courts, the Mayor's office, the D.C. Council, the various local bar associations, the Congress, and the media.

In the course of this effort, one overriding truth, not disputed on this record, was brought home to them. There was no committed political constituency, other than themselves, for increased resources for indigent defendants, and no political support for legislation that would be required to increase the compensation levels. That is, the conventional political processes to which the rulings of the FTC and the court below would relegate these lawyers were unavailing in the circumstances. At the same time, they learned that all knowledgeable elements of the community recognized the problems of inadequate compensation and expressed in private the view that the levels should be increased. Confronted with the paradoxical situation of a general private recognition of the justness of their cause coupled with a refusal by community leaders to espouse it because of its political unpopularity, these lawyers agreed not to accept CJA appointments after a certain date as an act of political theater, consciously designed to dramatize the adverse effects of the compensation levels on the criminal justice system. While the prolonged effort to develop political support had failed, the boycott worked because it received widespread public attention, and resulted in community leaders expressing

the support in public for increased compensation which they had previously expressed only in private.

It is argued that the boycott should be proscribed because it involved unacceptable economic coercion against the District of Columbia government. The assertion that this handful of lawyers could coerce the District of Columbia government into legislating to increase the compensation levels against its better judgment approaches absurdity. The record summarized in Respondents' briefs makes it clear that the D.C. Government responded positively to the boycott because it understood the case for increased compensation, and recognized the newly awakened political support in the community for it which was generated primarily by the boycott.[5]

It follows that the CJA lawyers' decision to no longer accept appointments was an integral part of a political campaign to dramatize and to obtain public support for compensation at minimum levels capable of sustaining an effective criminal defense.

C. The Level of CJA Compensation in Effect at the Time of the Boycott Raised Serious Questions As to Whether Indigent Defendants Could Receive Effective Assistance of Counsel

Respondents, perhaps understandably, did not argue that the level of compensation under the District of Columbia Criminal Justice Act in the past had resulted in systematic denial of effective assistance of counsel. This Court is not bound by that position in appraising the significance under the Sixth Amendment of rates of $20

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[5] The validity of the assertion that the government was coerced into making modest increases in the compensation levels can be tested by assuming that the lawyers had demanded increases to levels higher than compensation generally received for equivalent services in the Bar. It seems virtually certain that the District of Columbia Government would have disagreed with such demands, and would have had little difficulty in rejecting them, and in making alternative arrangements for indigent defense (C.A. App. 366-67).

an hour for out-of-court and $30 an hour for in-court time, with drastic caps on per-case charges. The record summarized in Respondents' briefs leaves no doubt and this Court can take judicial notice of the fact that such compensation levels will not support even a moderately complex criminal defense without subsidy or uncompensated effort. The investigative demands of such a defense in particular cannot be sustained at such compensation levels. Further, both the record and common sense show that the defense counsel specializing in CJA work (who handled approximately 85% of the volume) cannot afford the minimal office facilities, clerical assistance, and research tools necessary for effective performance in any trial practice. *See State ex rel. Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976) (appointment of counsel to represent indigent defendants at compensation levels roughly comparable to D.C. CJA levels suspended to avoid an unconstitutional taking of property); *Jewell v. Maynard*, No. 18320, slip op. (W.Va. Sup. Ct. App. April 26, 1989) (lawyers may not be appointed to indigent defenses at fees less than $45 per hour for out-of-court and $65 for in-court work, in order to ensure effective assistance of counsel and equal protection).

Calculated in terms of 1970 dollars (when the CJA was enacted), the fees paid to CJA lawyers in 1983 at the time of the boycott were approximately $7.80 an hour for out-of-court and $11.70 per hour for in-court time.[6] At the hearing before the FTC, the SCTLA presented substantial evidence that inadequate fees impaired effective representation in several respects. First, inadequate compensation had driven away more experienced attorneys who could no longer afford the financial and psychological strain of operating at only a marginal economic level or at a loss (Pet. App. 175a-177a). Second, to off-

[6] These figures are calculated from information in the *U.S. Department of Commerce Statistical Abstract of the United States* (108th ed. 1988).

set the low hourly rate and the low ceiling per case—$400 for misdemeanors and $1,000 for felonies[7]—CJA attorneys took on more cases than they could adequately handle. Many of these attorneys operated without an office, a secretary, or any other support services, all of which would have enhanced the quality of their representation. More conscientious attorneys took on fewer cases so that they would have more time for necessary preparation. Since fewer cases meant only marginal incomes, these practitioners would ultimately be forced to leave the indigent criminal defense practice. (Pet. App. 176a.)

Eight years earlier, a joint committee of the Judicial Conference of the D.C. Circuit and the D.C. Bar (Unified) had identified each of these negative factors and recommended that the $20 and $30 per hour fees (which had not yet experienced the full impact of inflation) be raised to $40 an hour to ensure minimally adequate representation (C.A. App. 762-71). Similar recommendations were made by various groups in 1982-83 regarding the inadequacy of the same hourly fee levels in the Federal CJA, which were subsequently increased by Congress (C.A. App. 783-85).

It is of course possible that absent the boycott some portion of the CJA regulars might have continued to accept appointments, and other Bar members might have accepted casual or intermittent appointments as fillers to more lucrative employment. In this way the District of Columbia's Sixth Amendment obligations might be nominally filled. However, the steady march of inflation would inevitably erode the services provided to indigents, and eventually such a system would reach crisis proportions and break down. Recognition of the inevitability of this process was one element prompting the boycott. The ability of the CJA lawyers, who were most aware of

[7] In 1970 dollars, these limits were equivalent to $156 and $389 in 1983. *See* note 6, *supra*.

and concerned with the process, to dramatize its evils should not be contingent on a complete breakdown in constitutional protection where the end result is clear. The fact that the boycott succeeded in galvanizing the community into remedial action is a compelling indication of its extrinsic political character, and of the desirability of preserving such avenues of protest, free of the chilling prohibitions of commercial trade regulation.

D. A Boycott Which Seeks to Protect Otherwise Undefended Constitutional Rights Should Be Immunized Even Where the Participants Are Competitors and Their Primary Motive May Be Economic

The court below distinguishes the SCTLA boycott from the citizens' boycott involved in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) and similar cases by asserting that the CJA regulars were competitors and that their primary motive was to better their economic status. As to the latter, it seems self-evident that boycotters raising constitutional grievances will most often, like the *Claiborne* blacks, be driven by a mixture of economic and other motives. As Judge Silberman points out in his concurrence (Pet. App. 60a), an attempt to quantify and rank the relative importance of a boycotter's motives is fruitless and largely irrelevant, since the existence of a significant, *bona fide* political content and context should be determinative. Political acts motivated by economic self-interest are as entitled to First Amendment protection as those springing from pure altruism. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *Noerr*, *supra*, 365 U.S. at 138-39. Political and economic motives are often mixed, and persons with economic stakes may have the strongest incentives to raise political and constitutional issues. *Board of Trustees v. Fox*, 57 U.S.L.W. 5015, 5019 (U.S. June 29, 1989) ("Some of our most valued forms of fully protected speech are uttered for a profit.").

It is also argued that the CJA regulars were competitors in the sense that they competed for the limited number of CJA defense assignments in a market defined by what the government was willing to pay. Whatever their competitive status, the CJA regulars clearly did not compete in a market where their conduct could directly affect prices paid by other members of the public, but in one with a single, monopsonistic buyer and price setter. *See Apex Hosiery Co. v. Leader*, 310 U.S. at 492-93, 501.

Further, the principal market effect of the boycott appears to have been to increase the number of lawyers accepting CJA assignments, and hence the competition for such assignments.

Given the many alternatives available to the D.C. Government, one can be skeptical that the collective action of these individually powerless lawyers could have achieved the economic compulsion which is the touchstone of the antitrust laws' condemnation of combined as opposed to individual action. Whatever the economic results of this boycott, it clearly produced an awakening of the public to evils of which the participants were uniquely aware. As in *Claiborne*, the economic effects were ancillary to the political pressure generated by collective action, and the policies of the antitrust laws are only weakly engaged, if at all, by the actual outcome.

It follows that the economic effect of the boycott, *if any*, on the price paid by the government for indigent defense services should be greatly outweighed by the public benefit derived from their collective action in calling attention to the growing inadequacy under the Sixth Amendment of the CJA compensation levels. As this Court observed in *NAACP v. Button*, 371 U.S. at 431, collective action,

> while serving to vindicate the legal rights of [an otherwise powerless minority] . . ., at the same time and perhaps most importantly, makes possible the

distinctive contribution of a minority group to the ideas and beliefs of our society.

To hang the legality of the CJA regulars' actions under the antitrust laws solely on their highly problematic competitor status is to enshrine a technicality, and to ignore and thus suppress the intrinsic political nature of their challenge to the threatened undermining of Sixth Amendment rights of a powerless group. Where a boycott seeks to advance a fundamental right of an otherwise unrepresented group, it should be lawful under the trade regulation laws whether or not the participants are competitors in the purchase or supply of goods or services.[8]

III. IF THE COURT ADOPTS THE RATIONALE OF THE COURT BELOW, IT SHOULD MAKE CLEAR IN SO DOING THAT THE SHERMAN ACT DOES NOT APPLY TO NON-VIOLENT CITIZEN BOYCOTTS ADDRESSED EITHER TO PRIVATE OR GOVERNMENT INTERESTS WHICH SEEK TO RAISE CONSTITUTIONAL OR POLITICAL ISSUES

If this Court concludes that the Court of Appeals has correctly applied the Sherman Act to a boycott of the type here involved under the United States Constitution, it should make it clear that its holding does not apply to non-violent citizen boycotts, directed either to private interests or to governments, which seek to raise constitutional or other political issues. Whatever the justification for applying the Sherman Act to the boycott here in question, on a *per se* basis or under a rule of reason analysis, nothing that has been argued in this case justifies a departure from the principles enunciated in *Claiborne* and *Missouri v. National Organization for Women*, 620 F.2d 1301, insulating citizens' boycotts from

[8] The Court of Appeals did not reach Respondents' contention that the FTC's order was overly broad, and unreasonably restrictive of First Amendment freedoms. If the Court reverses the Court of Appeals, holding that the boycott was a violation of the Sherman Act, it should remand to that court for a determination of this issue.

the restrictions of trade regulation law. Citizens' boycotts are a powerful tool of democratic politics which enable groups which are otherwise unable to marshal the material assets necessary for political success to bring the economic suasion of their members' collective service or patronage into the political process, and thus offset the economic or political power of large aggregates of capital or powerful governments. Under *Claiborne* and its progeny such boycotts are protected against the chilling weight of antitrust prosecution. To proscribe such boycotts, or any subcategory of them, on the grounds that they are economically motivated or have economic effects would be tantamount to prohibiting them. In particular, the Court should recognize that the imposition of a market power test to citizens' boycotts would be tantamount to holding that only unsuccessful efforts to advance public issues through collective action are entitled to First Amendment protection—a patent absurdity.

The Court should reaffirm *Claiborne*'s holding that the Sherman Act was never intended to apply to collective citizen action in pursuant of political ends, and that such action, if non-violent and otherwise lawful, is protected under the First Amendment.

CONCLUSION

For reasons set forth in the Respondents' briefs as well as in this brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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Nos. 88-1198 and 88-1393

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In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., RESPONDENTS

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION, CROSS-RESPONDENT

On Writs Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

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BRIEF FOR THE WASHINGTON COUNCIL OF LAWYERS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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QUESTIONS PRESENTED

1. Whether the *Noerr* doctrine immunizes from liability under the antitrust laws a boycott designed solely to persuade the political branches of government to enact legislation, where the boycotters lacked market power—and therefore had no chance of obtaining their goal through economic coercion rather than political persuasion—and in addition were motivated by substantial, bona fide, noneconomic concerns.

2. Whether the First Amendment bars the imposition of antitrust liability upon participants in an expressive boycott where the participants lacked market power and the boycott accordingly could not have harmed competition.

3. Whether, in a case in which proof of market power is required to distinguish an economically coercive boycott from one that is simply politically persuasive, it is permissible to base a finding of market power solely on the fact that the boycott achieved its purpose.

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INTEREST OF THE AMICI CURIAE

The Washington Council of Lawyers ("the Council") is a nonpartisan, voluntary bar association created in 1971. The Council's purpose is to promote the practice of law in the public interest. Its membership includes attorneys from every segment of the Washington, D.C. legal community, as well as law students and members of related professions.

The National Legal Aid and Defender Association ("NLADA") is a private, nonprofit, national membership organization headquartered in Washington, D.C. Its purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons who lack the means to retain counsel. NLADA represents approximately 1775 organizations that provide representation to poor people in civil cases and 735 public defender offices engaged in representing indigent criminal defendants. NLADA's membership includes most of the country's public defender offices and legal services agencies, as well as appointed counsel and other private practitioners.

The Association of Trial Lawyers of America ("ATLA") is a voluntary association of about 60,000 attorneys around the country. ATLA's members primarily represent tort victims and criminal defendants.

Amici each have as one of their principal goals the provision of high-quality legal representation to persons of limited means. They believe that providing adequate compensation for court appointed attorneys is essential if that goal is to be achieved. In the instant case, the members of the Superior Court Trial Lawyers Association attempted to persuade the citizens and government of the District of Columbia that the statutory compensation rates for attorneys appointed to represent indigent criminal defendants were too low to guarantee quality representation. One component of this lobbying campaign was a highly visible refusal to take on new appointed cases. Amici believe that an expressive boycott undertaken for purposes of petitioning the government for redress of grievances is fundamentally different from the covert economic boycotts routinely condemned under the antitrust laws. Amici submit this brief to demonstrate why the antitrust laws and the Constitution should be construed to insulate such expressive boycotts from antitrust liability.[1]

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 36.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case differs substantially from a run-of-the-mill antitrust action, in which the challenged agreement among competitors is covert, has nothing at all to do with the legislative process, and is motivated solely by the desire for economic gain. The conduct that is the target of the Federal Trade Commission's enforcement effort here indisputably lies at the very core of the right to petition government for redress of grievances: a public boycott aimed at the government and intended to focus the attention of both government officials and the public at large on the need for legislation to remedy a pressing public problem—the severe deficiencies in the provision of legal services to indigent defendants in the District of Columbia.

Somewhat surprisingly, the Commission refuses even to recognize—let alone accommodate—the significant First Amendment aspect of the boycott conducted by the Superior Court Trial Lawyers Association ("SCTLA"). The Commission simplistically labels the boycott "price-fixing" (*e.g.*, Br. 14, 16, 23, 24, 32, 35, 42, 43), in the apparent belief that affixing that label will somehow mask the quite different context in which this boycott arose.[2] And it asserts that the Trial Lawyers' direct lobbying effort in no way resembles the conduct protected in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

The antitrust laws obviously have some application to boycotts by those who enter into economic relationships with governmental entities. Even government is entitled to a measure of protection against economic coercion and anticompetitive conduct. At the same time, however, it must be recognized that policy decisions concerning government purchases of goods and services—such as deci-

[2] In fact, of course, the Trial Lawyers did not engage in price fixing, but rather in a concerted refusal to deal. They did not agree upon a price and indeed accepted the take-it-or-leave-it offer that was presented to them by the District government. Pet. App. 10a, 82a, 204a.

sions regarding the provision of legal services to the poor—frequently have a significant political as well as economic component, especially when those decisions are reached through the political process. That political aspect of the relationship between the District and the Trial Lawyers—and the political context in which the relationship was hammered out—counsels caution lest the antitrust laws be applied in a manner that trenches improperly and unnecessarily on the right to petition government.

These considerations favor an approach that exempts political boycotts from antitrust scrutiny, while preserving regulation of commercial boycotts. Indeed, such an approach is compelled by the *Noerr* doctrine, which immunizes political activity against regulation under the Sherman Act. Two factors are relevant in delineating the class of political boycotts protected by *Noerr*. The first is whether the participants in the boycott exercised market power. A boycott may either persuade or coerce; if the participants lacked market power, "the boycott must have succeeded out of persuasion and been a political activity" and *Noerr* immunity applies. Pet. App. 60a (Silberman, J., concurring). That principle is dispositive in this case, for the Commission has not shown that the Trial Lawyers exercised market power.

Even if the SCTLA could be shown to have had market power, it would be immune under *Noerr* if the motivation of the boycott participants was something other than economic self-interest. If a noncommercial motive predominated, or if the boycott only barely met the market power test and was motivated by a substantial noncommercial motive, the boycott would be protected under *Noerr*.

If antitrust immunity were not available under *Noerr*, it would be required by the First Amendment. Boycotts such as this one clearly qualify as expressive conduct protected by the First Amendment. Government regulation therefore must be narrowly tailored to serve a substantial government interest and may not reach beyond

what is necessary to further that interest. Condemning an expressive boycott without proof of market power, as the FTC did here, violates this standard. A boycott that does not wield market power cannot harm competition; the government's interest in preventing anticompetitive conduct accordingly can be protected fully—and the burden on speech substantially reduced—by requiring proof of market power before an expressive boycott may be condemned under the antitrust laws.

ARGUMENT

I. THE *NOERR* DOCTRINE PROHIBITS THE IMPOSITION OF ANTITRUST LIABILITY IN THIS CASE

This Court held in *Noerr* that—as a matter of statutory construction—the Sherman Act does not reach concerted efforts to restrain trade that involve petitioning of government officials. The Court observed that nothing in the statute's legislative history indicates that Congress intended to regulate political activity and, in addition, a broader construction of the statute would infringe upon the right to petition protected by the First Amendment. 365 U.S. at 137-138; see also *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The Court recently made clear that the availability of *Noerr*'s protection depends on "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 108 S. Ct. 1931, 1936 (1988). Despite this express determination that immunity turns on the precise factual context in which a *Noerr* claim is raised, the FTC proposes (Br. 14-17) several categorical limits on *Noerr*'s reach that would preclude consideration of the facts surrounding the boycott in this case. These limits are wholly unjustified. Contrary to the FTC's assertions, boycotts are not categorically excluded from *Noerr*'s protective umbrella. Rather, as we show below, where an examination of the relevant factors indicates that a boycott aimed at the government is primarily political—rather than primarily

commercial—in nature, that boycott is entitled to *Noerr* immunity.

A. The *Noerr* Doctrine Is Not Limited To Restraints Of Trade That Stem From Government Action, But Also Encompasses Private Restraints Incident To The Exercise Of The Right To Petition

The FTC argues (Br. 15-16) that *Noerr* extends only to restraints of trade that result from governmental action and has no application to wholly private restraints that are incident to the exercise of the right to petition. That crabbed interpretation of the *Noerr* doctrine already has been rejected by this Court.

In its recent decision in *Allied Tube*, the Court recognized that the *Noerr* doctrine has two separate aspects. First, where a challenged restraint of trade results from valid government action, "those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." 108 S. Ct. at 1936. Second, "*where, independent of any government action, the anticompetitive restraint results directly from private action*, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity." *Ibid.* (emphasis added; citation omitted).

The Court applied the latter principle in *Noerr* itself. One of the arguments in that case was that the railroads' publicity campaign by itself violated the Sherman Act, without regard to the effect of any governmental action stimulated by the publicity campaign. The Court rejected the contention, declining to subject such "political" activity to regulation under the Sherman Act. 365 U.S. at 140-141, 143-144. Similarly, the Court in *Allied Tube* did not end its consideration of *Noerr's* applicability when it concluded that the challenged restraint was the result of private, not governmental, action. See 108 S.Ct. at 1938. Rather, the bulk of the Court's opinion addressed whether *Noerr* immunity extended to this wholly private restraint because the restraint and its effect "were incidental to a valid effort to influence governmental action." *Ibid.*; see *id.* at 1938-1942. The latter discussion was necessary only because the Court has rejected the narrow view of *Noerr* advanced by the FTC here.

B. There Is No "Boycott Exception" To The *Noerr* Doctrine; Boycotts Are Subject To The Same Analysis As Other Private Restraints

The Commission also argues (Br. 15-17) that *Noerr* immunity never extends to a group boycott, regardless of the circumstances surrounding the restraint. This Court has never endorsed that proposition and there is no reason that it should do so here. A boycott should be subjected to the same analysis as any other restraint of trade.

The Court did observe in *Noerr* that a publicity campaign designed to sway public opinion and ultimately influence legislation bears no resemblance to boycotts and other kinds of agreements that often are held to violate the Sherman Act. 365 U.S. at 136. But it did not in any way indicate that the principles set forth in that decision may never apply to any boycott, regardless of the context in which it occurs. Because *Noerr* did not involve a boycott, the Court had no occasion to address the issue.

The FTC's reliance (Br. 16-17) on *Allied Tube* is similarly misplaced. The defendant in that case had argued "that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." 108 S.Ct. at 1938. In the course of rejecting that "absolutist position," the Court listed examples of various types of conduct—including horizontal boycotts—that would be protected if the defendant's extreme approach were adopted. *Id.* at 1938-1939. Significantly, the Court *did not* hold that the sorts of conduct listed could never be eligible for protection under *Noerr*. After setting

forth its list of examples, the Court "conclude[d] that the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." *Id.* at 1939. Far from establishing categorical exclusions from *Noerr*, therefore, the Court simply announced that proof of a restraint's impact on legislation is not by itself sufficient to invoke *Noerr;* analysis of the context and nature of the activity is also required. See *id.* at 1936, 1941 n.10, 1942. *Allied Tube* thus indicates that all restraints are equally eligible for protection under *Noerr*; the applicability of the doctrine depends on an assessment of the particular restraint at issue.

Indeed, a categorical exclusion of the sort hypothesized by the FTC would not make any sense. The *Noerr* doctrine by definition comes into play only when the concerted action in question would otherwise violate the antitrust laws (if there were no antitrust violation, there would be no need for immunity). What basis could there be for extending the doctrine to some categories of antitrust violations and not others? The fact that some boycotts are classified as *per se* violations surely provides no reason for the distinction. *Per se* restraints are not classified as such because they cause greater damage to competition in every case; judicial experience simply justifies the conclusion that they are virtually always unreasonable. See page 25, *infra*. A single restraint held invalid under the rule of reason may inflict more damage upon competition than any number of *per se* violations. Accordingly, it would be much more logical to follow the course outlined in *Allied Tube*: judging *Noerr*'s applicability by utilizing the same standard for all restraints.

Two additional factors would make it especially inappropriate to exclude all group boycotts from *Noerr*'s protective umbrella. First, the scope of the term "group boycott" in this context is not at all clear. The Court has emphasized that "boycotts are not a unitary phenomenon." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 543 (1978). It has recognized that "there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine," and has concluded that "[s]ome care is therefore necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (citation omitted). The protean nature of concerted refusals to deal—and the resulting murky boundaries of the *per se* rule in this context—counsel against limiting the scope of *Noerr* immunity in the manner suggested by the FTC.

Second, the group boycott has long been accepted in this country as a legitimate and important vehicle for achieving social change. As the court of appeals itself recognized, "boycotts have historically been used as a dramatic means of communicating anger or disapproval and of mobilizing sympathy for the boycotters' cause." Pet. App. 46a; see also *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 911-912 (1982). Among the many examples of boycotts in American history are the refusal of the American colonists to import British goods in order to protest the Stamp and Townsend Acts and the boycott of public transportation by black citizens of Montgomery, Alabama to protest racial segregation. Since Noerr is designed to insulate political activity from antitrust liability, it would make little sense to exclude from its scope a kind of activity that often is used for political purposes.

In sum, boycotts are not and should not be categorically excluded from *Noerr* protection. The availability of *Noerr* immunity with respect to any boycott—including the one in this case—turns upon an assessment of the context and nature of that boycott. It is to that inquiry that we now turn.

C. Examination Of The Nature And Context Of The Trial Lawyers' Boycott Establishes That The Trial Lawyers Are Entitled To *Noerr* Immunity

The threshold inquiry under *Noerr* is whether the challenged conduct was intended to influence governmental

action. See *Allied Tube*, 108 S.Ct. at 1938-1939; *California Motor Transport*, 404 U.S. at 510-511; *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 670 (1965). There can be no doubt that this requirement is satisfied here. The Trial Lawyers clearly initiated the boycott in order to influence the government of the District of Columbia. The boycott was aimed directly at the D.C. government and had the purpose of convincing the citizens and their elected representatives that the compensation of CJA attorneys was inadequate.[3]

Allied Tube directs that once this threshold requirement is satisfied, the "context" and "nature" of the restraint must be examined to determine whether *Noerr* immunity applies. The nature of the SCTLA's boycott and the context in which it occurred together indicate that that boycott should come within the protection of *Noerr*.

1. Noerr *Immunity Applies To The Trial Lawyers' Boycott Because The Boycott Was A Key Element Of A Broad Public Campaign To Lobby The Legislative And Executive Branches Of The D.C. Government*

Activities directed at influencing the political branches of government lie at the core of the conduct protected by the *Noerr* doctrine. In *Noerr* itself, the Court stated (365 U.S. at 137):

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would

[3] See, *e.g.*, Pet. App. 47a, 79a, 115a; J.A. 183-184 (testimony of Ralph Perotta), 506 (investigational hearing of Reginald Addison), 466-467 (deposition of Roger Pickens).

> have no basis whatever in the legislative history of that Act.

The Court concluded for these reasons that the Sherman Act did not regulate a publicity campaign designed to create public support for legislation.

Applying the same principle, the Court reached a different result in *Allied Tube*. Because the challenged conduct in that case "took place within the context of the standard-setting process of a private association," and was therefore one step removed from the political process, the Court held that the defendant's efforts to influence that association should not be given "the same wide berth accorded legislative lobbying." 108 S.Ct. at 1939. The private context in which the conduct occurred weighed against applying *Noerr* immunity. *Id.* at 1939-1941; cf. *California Motor Transport*, 404 U.S. at 511-513 (although *Noerr* extends to petitioning of the judiciary, some conduct that might be acceptable in the political arena may be sanctionable in the judicial forum).

The present case resembles *Noerr* more than *Allied Tube*—the boycott here took place "in the open political arena, where partisanship is the hallmark of decisionmaking." *Allied Tube*, 108 S.Ct. at 1940. The boycott was focused upon the government itself, seeking to gain attention for and redress of the Trial Lawyers' grievances. Indeed, this is a stronger case for *Noerr* immunity because, unlike even *Noerr* (see *id.* at 1938), this case involves direct petitioning of the government. It is difficult to imagine conduct more intimately involved in the political process.

Moreover, the Trial Lawyers' action closely resembles *Noerr* in two other respects. The Court in *Noerr* emphasized the public nature of the defendants' campaign, which involved a broad variety of techniques for soliciting public support, including the use of circulars, speeches, and newspaper and magazine articles. See 365 U.S. at 142-143. In a representative democracy, gaining the public's support is often an essential prerequisite to

persuading the government to adopt a proposal. Concerted activities accompanied by bona fide efforts to win the sympathies of the populace are thus more likely to have a political orientation—and are accordingly more deserving of protection under *Noerr*—than concerted activities conducted outside the public arena that do not depend at all upon public support for the satisfaction of their goals.

The Trial Lawyers engaged in considerable efforts to generate favorable publicity. They conducted press conferences, issued press releases, granted interviews, engaged in nonviolent picketing, passed out pamphlets, and held rallies.[4] These efforts were extremely successful. The boycott received substantial coverage—most of which was favorable—in the local, national, and international broadcast and print media.[5]

A second way in which this case resembles *Noerr* is that the challenged restraint was part of a broader lobbying campaign directed at the political branches of government. See *Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 783, 785 (E.D. Pa. 1957), aff'd, 273 F.2d 218 (3d Cir. 1959), rev'd on other grounds, 365 U.S. 127 (1961). The Trial Lawyers used a variety of means to obtain redress of their grievance through the political process. Aside from the boycott, they testified before the D.C. Council in favor of an increase in compensation rates and conducted an extensive lobbying campaign during which they pled their case to the mayor, his aides, the Chief Judge of the D.C. Superior Court, and key members of the D.C. Council and the

[4] See, *e.g.*, Pet. App. 47a, 79a; J.A. 225-229 (testimony of Karen Koskoff), 253-254 (Addison testimony), 260-262 (testimony of Nelson Kline), 268-269 (testimony of Joanne Slaight), 461-462, 466-467 (Pickens deposition), 506 (Addison deposition), 523-525 (Koskoff deposition), 914-917 (SCTLA press kit), 918-920 (SCTLA pamphlet).

[5] See J.A. 896-900, 921-954 (newspaper and magazine articles and transcripts of television coverage); see also *id.* at 398-399 (testimony of David Isbell).

United States Senate and their aides.[6] These facts strongly bolster the conclusion that the boycott was simply an additional means of bringing the matter to the attention of the government and the public.

Because the conduct at issue here can only be characterized as direct petitioning of the government, it plainly is "an activity that has traditionally been regulated with extreme caution." *Allied Tube*, 108 S.Ct. at 1940. The context in which the boycott took place accordingly weighs strongly in favor of recognizing *Noerr* immunity in this case. *Allied Tube*, 108 S.Ct. at 1940.

Indeed, some language in *Allied Tube* indicates that this factor is dispositive. The Court there stated that "*at least outside the political context*, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability." 108 S.Ct. at 1941 n.11 (emphasis added in part). Here, where the conduct occurred in the thick of a political battle, there is considerable basis for concluding that *Noerr* applies for that reason alone. The Court need not reach that question, however, because the second factor identified in *Allied Tube*—the nature of the restraint—also weighs in favor of *Noerr* immunity.

2. *The Nature Of The SCTLA's Boycott Indicates That It Is Entitled To Noerr Immunity*

In assessing the "nature" of a particular restraint to determine whether *Noerr* immunity applies, the operative dichotomy is between "commercial activity that has traditionally had its validity determined by the antitrust laws themselves" and activity, "[t]he essential character [of which is] * * * political." *Allied Tube*, 108 S.Ct. at 1939, 1940. Boycotts, taken as a class, differ markedly from the restraints in *Noerr* (which the Court found to be "political") and *Allied Tube* (which the Court placed

[6] See, *e.g.*, J.A. 183 (Perotta testimony), 217-221 (Koskoff testimony) 246-248 (Addison testimony), 792 (letter from Perotta to Mayor Barry).

in the "commercial" category) because they have one foot in each camp. See *Claiborne Hardware*, 458 U.S. at 888 (likening boycotts to "chameleons"). Boycotts in the commercial context have long been scrutinized under the antitrust laws. See, *e.g.*, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914). At the same time, as we have discussed (at 9), boycotts are a well-recognized—and frequently utilized—means of political expression. This Court concluded as much in *Claiborne Hardware*, holding that expressive boycotts are protected by the First Amendment. See 458 U.S. at 907-915.[7]

There are three possible ways in which the "nature" aspect of the *Noerr* inquiry could take account of the dual character of boycotts. The Court could adopt the course of action proposed by the FTC: ignore the political aspect of boycotts and withdraw *Noerr* immunity from all boycotts. But that approach would mean that even a wholly symbolic boycott—for example, five lawyers engaging in a joint vigil/work stoppage in front of the District Building to protest the CJA pay scale—could lead to liability under the Sherman Act. Penalizing such obviously political action is impossible to square with the principles set forth in *Noerr*.

Alternatively, the Court could take the opposite tack, treating all boycotts as political conduct for purposes of assessing the nature of the restraint. As discussed above (at 13), when a boycott takes place in the legislative lobbying context, there is considerable force to classifying it as political activity protected by *Noerr* immunity.

Finally, the Court could reject each of these absolute approaches and instead distinguish boycotts that are essentially political in nature—and therefore eligible for *Noerr* immunity—from those that are essentially commercial in nature—and for that reason unprotected. Drawing such a distinction would accommodate the general interest in thwarting anticompetitive conduct with the interests underlying *Noerr*. Dividing boycotts into these groups is not a terribly difficult undertaking. Two factors are relevant: (1) the extent to which the boycott is aimed at persuading, as opposed to coercing decisionmakers, and (2) the extent to which the boycott participants are motivated by reasons other than economic self-interest.

As Judge Silberman observed in his concurring opinion below, a boycott that "coerce[s] the government *qua* economic actor creates a distortion of the market and the political process." Pet. App. 60a. Such a boycott is less "political" than a boycott whose power is limited to its political persuasiveness and whose success therefore could be a result only of prevailing in the hurly burly of the political battlefield.

A basic building block of antitrust analysis—the market power inquiry—provides a useful means of distinguishing between a persuasive boycott and a coercive one. If the participants in a boycott lack market power, "the boycott must have succeeded out of persuasion and been a political activity. But, if there is market power, one must assume, for antitrust purposes, it came into play and that the boycott was primarily commercial." Pet. App. 60a.[8] Where the participants in a boycott aimed at the government lack market power, and therefore lack the ability to coerce, their boycott should be classified as a political one that falls within the protection of *Noerr*.[9]

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[7] In this respect, boycotts are quite different from other recognized restraints on competition. Price fixing, for example, is not known as a means of political expression.

[8] One author has concluded that *Noerr* immunity should be extended to boycotts that are predominantly political in nature where an assessment of indicia of market power indicates that the boycott participants did not exercise market power. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 115 (1985).

[9] Using the market power inquiry to determine whether a boycott aimed at the government is persuasive—and hence political—rather

A second criterion that should be considered is whether the participants in the boycott are motivated by concerns other than economic self-interest. This factor comes into play only if the boycott participants possess market power: boycotters who lack market power need not have any non-economic motivation in order to qualify for *Noerr* immunity. The Court has made clear that self-interested boycotts qualify for *Noerr* protection as long as other factors substantiating the political nature of the action are present. *Allied Tube*, 108 S.Ct. at 1941 n.11; *Pennington*, 381 U.S. at 669-670. *Noerr* itself held that "at least insofar as [concerted activity is] directed toward obtaining governmental action, its legality [is] not at all affected by any anticompetitive purpose it may have * * *." 365 U.S. at 139-140.[10]

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than coercive—and thus commercial—has the effect of requiring application of the rule of reason rather than the *per se* rule. This makes perfect sense because the rationale underlying the *per se* rule does not hold if the challenged conduct likely succeeded for political rather than economic reasons. The *per se* rule applies only to restraints of trade that by their very nature have a "pernicious effect on competition" and "lack * * * any redeeming virtue." *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). If there is any doubt about whether a practice "threatens 'the central nervous system of the economy,'" the *per se* rule should not apply. *Broadcast Music, Inc.* v. *Columbia Broadcasting Syst., Inc.*, 441 U.S. 1, 23 (1979) (citation omitted). It is far from clear that all or even most boycotts aimed at government—which have long been an accepted instrument of political discourse—have a pernicious effect on competition and lack any redeeming value. Applying the *per se* rule to such boycotts is therefore unjustified on the *per se* rule's own terms.

[10] A majority of the court of appeals concluded that the absence of a predominant unselfish motivation can by itself be a reason for denying *Noerr* protection. See Pet. App. 41a. It did not indicate how this rule could be squared with *Noerr* and *Allied Tube*, both of which expressly rejected such a notion. And the court's approach—like that advocated by the FTC—leaves no room for self-interested symbolic boycotts that succeed by dint of political persuasiveness rather than economic power. Indeed, the majority did not respond at all to Judge Silberman's telling criticism of its approach and his suggestion that market power provided a relevant and appropriate criterion for distinguishing between protected and unprotected boycotts. Pet. App. 58a-61a.

Motivation matters only if the market power inquiry reveals that the boycott has a significant coercive element. In the United States, unselfish motive is closely identified with political activity. The Nation has a long tradition of political activism undertaken for unselfish reasons and this Court itself has indicated that expressive boycotts of this nature contain "elements of majesty." *Claiborne Hardware*, 458 U.S. at 888. For that reason, boycotters who possess market power are entitled to *Noerr* protection if the predominant reason for their boycott is not economic self-interest. This factor explains the result in *Claiborne Hardware*. The boycotters in that case clearly did have market power: they constituted more than three-quarters of the population of Claiborne County. *NAACP* v. *Claiborne Hardware Co.*, 393 So. 2d 1290, 1295 (Miss. 1981), rev'd on other grounds, 458 U.S. 886 (1982). Because their predominant motivation was to stimulate general social and political change, however, their boycott could not be confused with the commercial boycotts that are "normally held violative of the [antitrust laws]" (*Noerr*, 365 U.S. at 136). Lower courts have relied upon analogous facts in finding expressive boycotts protected under *Noerr*. See, *e.g.*, *Missouri* v. *National Org. for Women ("NOW")*, 620 F.2d 1301, 1314-1315 (8th Cir.), cert. denied, 449 U.S. 842 (1980).

In some cases, it may not be clear whether participants in a boycott aimed at the government possess market power or whether their predominant motivation is economic self-interest. In such cases, the Commission and the courts should consider the two factors together. If the boycotters possess some degree of market power, but not an overwhelming amount, then the fact that they have a substantial—though not necessarily predominant—unselfish motivation could tip the balance in favor of viewing their boycott as political, rather than commercial.

Application of these criteria in the present case establishes that *Noerr* immunity is warranted. The current record strongly suggests that the Trial Lawyers lacked market power and that their boycott succeeded because it was politically persuasive, not economically coercive. For example, the participants in the strike were far outnumbered by non-participants who were qualified to accept criminal appointments.[11] Moreover, the record is replete with evidence that the D.C. government had always favored increasing reimbursement rates[12] and received the necessary *political* impetus to do so because of the favorable publicity generated by the boycott.[13] (Indeed, if the government had been coerced into raising the rates, it could have brought an action for damages against the SCTLA. Its failure to bring such a suit strongly suggests that its action was voluntary.)

If the Court is not convinced that market power was absent based on the existing record, it should remand for further factual development. As we discuss in greater detail below (at 30), the FTC has at this point fallen far short of proving that the Trial Lawyers had any market power at all. See also Pet. App. 53a-57a.

As for the question of motivation, it is clear—as the court of appeals acknowledged (Pet. App. 43a)—that the Trial Lawyers were motivated at least in part by selfless concerns. The record is uncontroverted that these attorneys believed that higher rates of compensation would result in better service for indigent defendants

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[11] See J.A. 121-122 (testimony of Francis Carter), 375 (Isbell testimony).

[12] See, *e.g.*, J.A. 174, 176, 187 (Perotta testimony), 208, 217-218, 222 (Koskoff testimony), 249 (Addison testimony), 302 (Pickering testimony), 382 (Isbell testimony). Indeed, as the New York Times reported, "[t]he unusual thing about the lawyers' planned job action is that almost no one disagrees with their argument." J.A. 900.

[13] See J.A. 185-187 (Perotta testimony), 363-365 (testimony of Sterling Tucker), 399 (Isbell testimony), 497-498 (Perotta investigational hearing).

and that a boycott would help achieve that end.[14] Several state courts have emphasized that the quality of legal representation is directly related to the adequacy of compensation. See, *e.g.*, *White* v. *Board of County Comm'rs*, 537 So. 2d 1376, 1380 (Fla. 1989); *Jewell* v. *Maynard*, No. 18320, slip op. 16-17 (W. Va. Apr. 26, 1989); see also *Kansas ex rel. Stephan* v. *Smith*, 242 Kan. 336, 747 P.2d 816 (1987); J.A. 322-323, 327 (testimony of Professor Geoffrey Hazard). When the evidence indicating that the Trial Lawyers' success was due to persuasion, not coercion, is viewed in conjunction with the evidence that these attorneys did have a strong—if not predominant—unselfish motivation, it is clear that their boycott was political, not commercial in nature.

D. Construing The *Noerr* Doctrine To Immunize Non-Coercive Expressive Boycotts Will Not Hamper Antitrust Enforcement

Providing *Noerr* protection to boycotts aimed at the government will not have the apocalyptic effects of which the FTC complains (Br. 20). For one thing, such conduct is relatively rare and the Commission has provided no indication that the decisions of other courts according *Noerr* protection to expressive boycotts[15] have resulted in any increase in commercial boycotts masquerading as political ones. The Commission admits as much. See Br. 33. If the Court adopts a rule requiring inquiry into market power and motivation, there is even less cause for

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[14] See J.A. 157, 160 (Perotta testimony), 236-239 (Koskoff testimony, 263, 266-267 (Slaight testimony), 497-498 (Perotta investigational hearing), 504-505 (Addison investigational hearing), 553-560 (SCTLA document entitled *Representing The Poor: Criminal Injustice And Effective Representation*), 826-830 (SCTLA's prepared statement in support of legislation to increase reimbursement rates), 871 (Perotta testimony before D.C. Council Judiciary Committee), 941 (WTTG Television interview with Abe Blitzer).

[15] See, *e.g.*, *NOW*, *supra*; *Crown Central Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759 (M.D. Pa.), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980); *Claiborne Hardware*, 393 So. 2d at 1301.

concern that boycotts of the sort the antitrust laws were intended to prevent would be able to slip through the antitrust enforcement net. If the participants in a boycott have market power, they would not be entitled to *Noerr* immunity unless their predominant motive is a noncommercial one. If, on the other hand, they do not have market power, their actions should be of no concern to antitrust enforcement regardless of their motive because the boycott could not harm competition. See also pages 29-30 note 17, *infra*.

To be sure, it would be easier for the Commission to have at its disposal a rule excluding all boycotts from *Noerr* protection. But refusing to acknowledge a *per se* rule of exclusion will not result in any diminution of the Commission's authority to regulate *commercial* boycotts. The only result will be the protection of the small number of boycotts that are *political* in nature.

II. THE FIRST AMENDMENT BARS THE IMPOSITION OF ANTITRUST LIABILITY FOR THE TRIAL LAWYERS' BOYCOTT ABSENT PROOF THAT THE TRIAL LAWYERS POSSESSED MARKET POWER

Even if the *Noerr* doctrine does not apply to the Trial Lawyers' boycott, the judgment of the FTC cannot stand. As the court of appeals pointed out (Pet. App. 46a), the boycott had a substantial expressive element and therefore, under *United States* v. *O'Brien*, 391 U.S. 367 (1968), "the scope of [any regulation of that boycott] must be limited lest the incidental restriction of the participants' First Amendment freedoms be greater than is essential to further the [government's] interest in maintaining competition." The FTC's "condemnation without proof that the boycott could in fact be anticompetitive ignores the command of *O'Brien* that restrictions on activity protected by the First Amendment be '*no greater than is essential*' to preserve competition from the sclerotic effects of combination." Pet. App. 49a (emphasis in original).

The FTC attacks the court of appeals' common sense approach on two grounds. First, it argues (Br. 25-26) that the attempt to regulate the SCTLA's boycott does not even implicate the *O'Brien* test. Second, it contends (Br. 28-40) that even if *O'Brien* does apply, that standard does not require proof of market power as a prerequisite to the imposition of liability under the antitrust laws. The FTC is wrong on both scores.

A. The Boycott Constitutes Expressive Conduct Protected By The First Amendment

This Court has made clear that "when 'speech' and 'non-speech' elements are combined in the same course of conduct," that conduct is entitled to substantial protection under the First Amendment. *O'Brien*, 391 U.S. at 376-377. Although there can be no dispute that the SCTLA's boycott contained expressive elements, the FTC nonetheless contends that the *O'Brien* standard should not apply. The Commission argues (Br. 26)—without explanation—that the boycott was not protected speech despite its expressive content. The Commission further asserts (*ibid.*) that the *Noerr* doctrine and this Court's holding in *Claiborne Hardware* "give substantial protection to 'expressive' activity that might otherwise fall within the broad language of the antitrust laws" and that therefore "superimposing" the *O'Brien* standard onto these existing doctrines represents an overaccommodation of free speech interests. These arguments are wholly unpersuasive.

1. The suggestion that the SCTLA's boycott was not adequately expressive to qualify for any First Amendment protection at all is flatly at odds with the record and this Court's precedents. The Court only recently reiterated that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Court has] asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who

viewed it.'" *Texas* v. *Johnson*, No. 88-155, slip op. 6 (June 21, 1989) (quoting *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974)). There can be no question that the SCTLA's boycott meets that test. As the court of appeals said:

> the "factual context" of the SCTLA boycott suggests that the participants intended to communicate a message regarding the prevailing CJA rates and that this message was understood by others. [The SCTLA's members] actively courted media coverage of their "strike" by handing out press kits and organizing picket lines and rallies. The media responded with a number of newspaper articles and television stories that not only reported the boycott but also served to publicize [the SCTLA's] claims that the prevailing CJA rates were inadequate.

Pet. App. 47a (citation omitted).

Indeed, the decision in *Claiborne Hardware* is dispositive of this question. The boycott at issue in that case contained several elements—including speeches, nonviolent picketing, assembly, exhortations to others to join the boycott, and publicizing the names of nonparticipants—that are by themselves entitled to First Amendment protection. 458 U.S. at 907-911. This Court held that the boycott—the agglomeration of all of these elements—could be regulated only if the requirements of *O'Brien* were met. *Id.* at 912. Because the SCTLA's boycott, like the one in *Claiborne Hardware*, was accompanied by speeches, nonviolent picketing, assembly, exhortations to others to join the boycott, rallies, dissemination of media kits, press interviews, and other First Amendment activity, applying the *O'Brien* standard here is not only appropriate, but required by "a straightforward application of controlling precedent." See *Thigpen* v. *Roberts*, 468 U.S. 27, 33 (1984).[18]

[18] The Commission bases its contrary conclusion on the fact that some economic regulations have been upheld against First Amendment challenge even though those regulations limited speech in a manner similar to the one at issue in this case. See Br. 27-28 &

2. The FTC's second argument—that applying *O'Brien* to the SCTLA's boycott would overaccommodate the First Amendment interests at stake here—is also flawed. The Commission's apparent view that *Noerr* and *Claiborne Hardware* leave no room for *O'Brien* rests on a gross misunderstanding of the relationship between the principles set forth in the three decisions.

To begin with, the *Noerr* doctrine is rooted in the statute itself, not in the Constitution. 365 U.S. at 132 n.6, 136-138. While *Noerr* is designed to avoid a collision between the Sherman Act and the First Amendment—and the contours of *Noerr* immunity for that reason may often parallel the relevant constitutional rules—there is no reason that *Noerr* and *O'Brien* should not exist side by side. Indeed, the claim that *Noerr* shuts the door on *O'Brien* attributes to Congress the power to limit the applicability of the First Amendment. There is no basis for leaving some First Amendment activity—that which implicates the antitrust laws but does not qualify for *Noerr* immunity—without any constitutional protection whatever.

The Commission's argument with respect to *Claiborne Hardware* and *O'Brien* is also defective. These decisions do not prescribe alternative forms of analysis; rather, *Claiborne Hardware* is the application in one particular context of the general rule set forth in *O'Brien*. Indeed, the Court in *Claiborne Hardware* cited *O'Brien* (see 458 U.S. at 912 & n.47) and concluded that the award of tort damages could not stand because it was not "tailored to

n.21 (citing, *e.g.*, *International Longshoremen's Ass'n* v. *Allied International, Inc.*, 456 U.S. 212 (1982)). But the cases cited by the Commission do not suggest that the First Amendment was not implicated by these government regulations, only that the Amendment was not violated. The mere fact that different regulations adopted to further different government interests in different contexts were found not to violate the Constitution says nothing about how the First Amendment applies here. The same response applies to the Commission's rather far-fetched claim (Br. 38-39) that rejection of its position here would cast doubt on the validity of statutes barring strikes by government employees.

the consequences of [the] unlawful conduct" (458 U.S. at 926). Nothing in *Claiborne Hardware* indicates that the decision in that case was intended to describe fully the extent to which the First Amendment limits government regulation of boycotts. The Court there simply addressed one particular fact situation; it did not indicate that *O'Brien* has no effect on *other* sorts of boycott regulations. The analysis of those issues accordingly remains open for the future.

B. Because The Commission Did Not Show That The SCTLA Possessed Market Power, Its Regulation Of The SCTLA's Boycott Was Not Narrowly Tailored To The Government's Legitimate Interest In Antitrust Enforcement

The Commission's condemnation of the SCTLA's boycott was predicated upon the principle that boycotts constitute *per se* violations of the antitrust laws and that individuals and groups that participate in a boycott may therefore be penalized without regard to whether the boycott actually harmed competition, *i.e.*, whether the participants actually had market power and whether the boycott's anticompetitive aspects actually outweighed its procompetitive aspects. Pet. App. 48a. Because the SCTLA's boycott constituted expressive conduct, however, the FTC's application of the *per se* rule can survive First Amendment scrutiny only

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. There is no question that application of the *per se* rule to the Trial Lawyers' boycott passes muster under the first three prongs of the O'Brien test. The issue here is whether use of the *per se* rule in this context is "essential to the furtherance" of the government's concededly legitimate interest in antitrust enforcement.

In order to satisfy this prong of the *O'Brien* test, condemnation of expressive boycotts under the antitrust laws must be "narrowly tailored" to serve a substantial governmental interest and may "not 'burden substantially more speech than is necessary to further' " that interest. *Board of Trustees of the State Univ. of New York* v. *Fox*, No. 87-2013, slip op. 8 (June 29, 1989) (quoting *Ward* v. *Rock Against Racism*, No. 88-226, slip op. 16 (June 22, 1989)). As the court of appeals held (Pet. App. 48a-51a), application of the *per se* rule to expressive boycotts is impermissible under this standard.

The *per se* rule is simply a rule of administrative convenience. It "avoid[s] a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct." *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 15 n.25 (1984); see also *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). Because the *per se* rule establishes a conclusive presumption that all agreements falling within certain broad categories violate the antitrust laws, some agreements that do not actually restrain trade inevitably will be subject to punishment. See *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982) ("[a]s in every rule of general application, the match between the presumed and the actual is imperfect"). In the run-of-the-mill concerted refusal to deal case, sacrificing accuracy "[f]or the sake of business certainty and litigation efficiency" (*ibid.*) is entirely acceptable. Regulations affecting only economic rights withstand constitutional scrutiny so long as they are rationally related to a permissible governmental interest. See, *e.g.*, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938).

When First Amendment rights are involved, however, the standard is far stricter. "Where political expression or association is at issue, this Court has not tolerated

the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *In re Primus*, 436 U.S. 412, 434 (1978). A regulatory technique that restricts protected conduct "may extend only as far as the interest it serves." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 565 (1980).

Penalizing expressive boycotts without any indication that they have the potential to harm competition is not an approach narrowly tailored to serve the government's interest in prohibiting anticompetitive activity; it burdens substantially more speech than is necessary to further that interest. See *Frisby* v. *Schultz*, 108 S.Ct. 2495, 2502 (1988) (a regulation "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"). The government's interest can be accommodated fully—with a substantially reduced burden on First Amendment rights—by condemning only those expressive boycotts that actually have the potential to harm competition.

A boycott that lacks market power cannot harm competition. As the court of appeals explained, "the market power requirement generally serves to ensure that the antitrust laws do not interfere with business arrangements that could not actually exert any detrimental effect on competition." Pet. App. 48a; see also *Northwest Wholesale Stationers*, 472 U.S. at 296. The FTC did not inquire whether the SCTLA possessed market power and therefore did not determine whether the boycotters "could • • • actually [have] exert[ed] any detrimental effect on competition." Its condemnation of the boycott accordingly cannot be said to be narrowly tailored to serve the government's interest in antitrust enforcement.

The FTC does not dispute that the *per se* rule sometimes ensnares those who are powerless to harm competition and that individuals attempting to exercise their First Amendment rights might be among these hapless victims. Rather, it contends (Br. 31) that "efficiency in achieving important governmental purposes is itself a

substantial governmental interest" that justifies using the *per se* rule in all boycott cases even if that approach does trench more deeply on First Amendment rights. That argument misses the mark for several reasons.

The contention that efficiency is a substantial interest in its own right is incorrect. As this Court recently explained, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *National Fed'n of the Blind, Inc.*, 108 S. Ct. 2667, 2676 (1988); *cf. Bowen* v. *Roy*, 476 U.S. 693, 730-31 (1986) (O'Connor, J., concurring and dissenting) (administrative efficiency does not justify burden on First Amendment free exercise of religion). The obvious question is: efficiency in accomplishing what end? The weight to be accorded to a claim of efficiency depends on the cost—in terms of harm to the government's interest—of using an alternative that is less burdensome on First Amendment rights.

The cases upon which the FTC relies are not to the contrary. *United States* v. *Albertini*, 472 U.S. 675 (1985), merely holds that the military is entitled to use the most effective means available to prevent a *known* vandal from vandalizing military property and need not be relegated to less effective means that might better accommodate the vandal's First Amendment interests. *Abertini* does not hold that efficiency justifies incidental incursions on the First Amendment freedoms of individuals who have not been proven to pose any threat to military property. Similarly, *Clark* v. *Community for Creative Non-Violence ("CCNV")*, 468 U.S. 288 (1984), holds only that the Park Service need not make exceptions to its rule banning overnight camping in designated areas in order to accommodate the First Amendment interest of political protestors, who indisputably will do more damage to the grounds if they camp overnight than if they do not. CCNV does not hold that, in the name of convenience, the Park Service is entitled to enforce a broad regulation that bans some expressive conduct that has no harmful effect on park grounds.

This case is thus quite different from *Albertini* and *CCNV*. In those cases there was a proven danger to the government's interest and the methods chosen by the government to address that danger were more effective than alternatives that might better have accommodated First Amendment rights. Here, the FTC asks to be relieved of the burden of showing that there was any danger at all. Purely for efficiency's sake, it wants to penalize participants in expressive boycotts without showing that their activities threatened competition. Such an outcome is not required by *Albertini* and *CCNV* and is not consistent with this Court's repeated warning that the government may not sacrifice speech on the altar of efficiency.

Indeed, this Court has made clear that efficiency is "not sufficient [by itself] to justify the creation of *per se* rules. If it were otherwise, all of the antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law." *Sylvania*, 433 U.S. at 50 n.16. Accordingly, the Court has limited the *per se* rule to conduct that by its very nature lacks any redeeming virtue, refusing to subject various kinds of concerted activities to *per se* condemnation. See, *e.g.*, *Northwest Wholesale Stationers, supra; National Collegiate Athletic Ass'n* v. *Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984); *BMI, supra; Sylvania, supra*. See also page 16 note 9, *supra*. The Court has been particularly emphatic in rejecting the notion that all concerted refusals to deal are subject to the *per se* rule, stating that courts need to show "care in application" of the rule lest concerted refusals to deal that are "characteristically [un]likely to result in predominantly anticompetitive effects" be unnecessarily penalized. *Northwest Wholesale Stationers*, 472 U.S. at 298, 295. Because efficiency cannot justify indiscriminately applying the *per se* rule to every kind of concerted activity, it cannot justify refusing to deviate from the *per se* rule where application of that rule conflicts with First Amendment values.

Finally, the Commission has substantially overstated the extent to which requiring proof of market power as a prerequisite to condemnation of expressive boycotts will affect antitrust enforcement. The market power requirement does not deprive the government of the ability to punish wrongdoing and does not keep the government from presenting relevant evidence that might be critical to its case. The FTC will lose no more than an "evidentiary shortcut." Pet. App. 50a. It can continue to enforce the antitrust laws as rigorously as it sees fit, but—at least where expressive boycotts are concerned—it must "prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns." Pet. App. 51a.

Such a requirement is not at all unusual. The government must demonstrate market power in any number of contexts, including, most obviously, monopolization and merger cases. Moreover, this Court has—as a matter solely of antitrust law—sometimes required a showing of market power as a prerequisite to application of the *per se* rule. See, *e.g.*, *Northwest Wholesale Stationers, supra; Jefferson Parish, supra; Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958). Because the government already bears the burden of proving market power in a vast number of situations, the addition of a few more cases in which it does not enjoy the benefits of a conclusive presumption of competitive harm is hardly likely to prove disastrous.[17]

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[17] The FTC's concern that imposing a market power requirement in this case will virtually eliminate the *per se* rule in boycott cases generally (Br. 32-35, 42-43) is, as the court of appeals observed, "hysterical." Pet. App. 50a. As we have discussed (at 22), the SCTLA's boycott was pregnant with expressive content. We doubt that courts will have much difficulty distinguishing boycotts like the SCTLA's from run-of-the-mill competitor boycotts that contain no speech element at all (see *Klor's*, *supra*) or only a sham speech element. Moreover, to the extent that a boycott contains bona fide

III. THE FTC CANNOT CARRY ITS BURDEN OF PROVING MARKET POWER SIMPLY BY POINTING TO THE SUCCESS OF THE BOYCOTT

The FTC argues (Br. 40-45) that even if it must prove that the SCTLA possessed market power, the record contains sufficient evidence to establish that fact. It contends that the remand ordered by the court of appeals is unnecessary because the very fact that the D.C. government increased reimbursement rates proves that the SCTLA had market power. As the court of appeals pointed out, however (Pet. App. 53a-55a), this contention is far too facile. The very reason for inquiring into market power in the first place is to determine whether the success of the boycott was the result of political persuasion or economic coercion. Allowing the Commission to rely on the fact of success alone would defeat the entire purpose of the inquiry. Rather than distinguishing between political persuasion and economic power, the Commission's approach would allow the application of the *per se* rule to every successful boycott, even those wholly political in nature. This rather transparent attempt to circumvent the protections of *Noerr* and the First Amendment cannot succeed.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part, and the case remanded with directions to dismiss the complaint.

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expressive elements, we see no reason why the FTC should be entitled to condemn it absent a showing of market power. Hence, we do not view the FTC's parade of horribles (Br. 33-35) as being very horrible at all. If physicians boycott Medicaid patients as a means of expressing their disagreement with low reimbursement rates, the FTC can punish them so long as it proves that they have the power to do competitive harm. If they have no such power, then the FTC should not be entitled to condemn their expressive conduct.

Respectfully submitted.

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